Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Review of the Section 251 Unbundling Obligations	)	CC Docket No. 01-338
Of Incumbent Local Exchange Carriers	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the Telecommunications Act of 1996	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

REPLY COMMENTS
OF THE VERIZON TELEPHONE COMPANIES

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I. INTRODUCTION AND SUMMARY

Long on rhetoric but lacking in facts, the CLECs urge the Commission to adopt an "all unbundling, all the time" standard. UNEs, they say, cannot be de-listed anywhere unless alternatives are available everywhere; no CLEC could ever replicate the ILECs' ubiquitous networks; unbundling promotes rather than discourages investment; the fact that some CLECs can compete without UNEs doesn't mean that other CLECs aren't impaired; other platforms such as cable and wireless are irrelevant to the impairment analysis. These are sound bites without substance – reflexive repetition of arguments that held sway in the UNE Remand Order but cannot be reconciled with competitive realities, the Supreme Court's *Iowa Utilities Board* decision, sound economics, the Commission's own intervening decisions, the NPRM in this proceeding, or the D.C. Circuit's opinion in *United States Telecom Association v. FCC* (*"USTA"*).

In the three years since the UNE Remand record was compiled, there has been a tremendous growth in alternative switches, transport, and high-capacity loops, as well as an explosion in inter-modal alternatives for both broadband and narrowband services. This new evidence compels a fundamental re-assessment of the outcomes adopted in the UNE Remand Order – a re-assessment that the Commission prudently has initiated in this proceeding by seeking to adopt a "more sophisticated" and "refined" analysis that "may more accurately pinpoint the circumstances under which unbundling is necessary to promote the goals we have identified." As Chairman Powell has noted, the *USTA* decision merely "directs the Commission to undertake a more focused examination of the Act's unbundling obligations," as already reflected in the "more granular" approach set forth in the Notice.

Given the state of the record, we believe that the Commission's course is clear:

First, as the Commission has recognized and the D.C. Circuit has confirmed, the Commission must examine "the state of competitive impairment in … particular market[s]," taking into account the significant deployment of alternative facilities noted by the Supreme Court in the *Verizon v. FCC ("Verizon")* case. It may not impose unbundling requirements "detached from any specific markets or market categories." In particular, the Commission should examine three distinct market segments – broadband (for both business and mass market customers), traditional dedicated (for both carriers and end users), and traditional switched services (for business and residential customers). These three categories rationally reflect meaningful differences in service functionality and/or type of customer, and each category logically encompasses a discrete set of UNEs.

To aid the Commission in this task, our 2002 Fact Report details the widespread availability of inter- and intra-modal alternatives for virtually every UNE, with data presented *both* for individual MSAs (or, in some cases, on a wire center basis) and on an aggregate, nationwide basis. Notably, the extent of deployment is so great that the Commission's market analysis is straightforward. For many key UNEs (circuit switching, dedicated transport, high-capacity loops, and signaling, for example), there has been so much investment in alternative facilities in so many different types of locations that the Commission can and should find non-impairment everywhere, absent a compelling showing by the proponents of unbundling that there is some specific market segment where they would be impaired – a showing that has not been made as to any UNE. Notably, such a finding, which is grounded in overwhelming marketplace evidence, is not tantamount to "abstracting away" specific markets; it is an eminently rational determination that the availability or potential availability of alternatives is likely to be identical

regardless of location – similar to the Commission's longstanding identification of a nationwide geographic market for long distance, even though each point-to-point route could be considered a separate geographic market. For other UNEs, such as non-high capacity loops, there are readily identified sub-markets – multiple dwelling units, new subdivisions, and locations that are served by significant inter-modal competition – where the evidence precludes any finding of impairment.

In contrast to our comprehensive, market-specific factual showing, the CLECs rely primarily on anecdotes and sweeping, unsupported claims that parrot back statements made in the UNE Remand Order. Indeed, only 19 of the 62 CLECs that filed either individually or jointly bothered to submit any data at all, and most of those included only a sentence or two stating how many switches or fiber miles they have. Even their limited information, however, confirms that the 2002 Fact Report is not only reliable, but conservative. For example, our count of CLEC packet switches and CLEC fiber route miles is far lower than the CLECs' own. In addition, their circumscribed disclosures – which undoubtedly were chosen to maximize the appearance of impairment – reveal that CLECs have a multitude of options other than ILEC UNEs. By way of illustration, Covad concedes that it obtains one-half of its dedicated transport from non-ILEC providers. Several CLECs acknowledge that they have dozens or even hundreds of switches and thousands of collocation arrangements, buildings served, and route miles of fiber. CLECs have deployed roughly sixty times as many mass market fiber loops as ILECs. And, Norlight admits that it "has generally been able to develop a successful, broadband-based business model using … special access facilities."

Second, the Commission must hold that states can neither expand the list of UNEs nor prevent items from being de-listed. Under Section 251(d)(2), it is up to *this* Commission to

determine what elements must be unbundled, applying a standard that is consistent with the goals of the Act. The general reservation provisions pointed to by the CLECs and PUCs reinforce rather than refute this analysis, since they permit only those state requirements that are consistent with the purposes of the Act. Accordingly, once the FCC finds a lack of impairment, it must preempt any state decision retaining or expanding unbundling obligations.

Third, to respect the impairment standard and further Congress's pro-competitive intent, once an element no longer meets the Section 251(d)(2) standard, the Commission must: (1) state that the corresponding Section 271 checklist item is deemed satisfied; (2) decline to grandfather in-place UNEs; and (3) establish a transition period no longer than six months (or a period negotiated by the parties), within which CLECs must migrate existing UNE-served customers to alternative arrangements. And, any UNEs that must still be unbundled as a result of this proceeding should be sunset within three years in order to preserve appropriate investment incentives.

For remaining UNEs, the Commission should exercise the pricing authority noted in *Verizon* to establish more efficient TELRIC-based prices that promote genuine facilities-based competition. The Commission should clarify its existing rules to resolve disputes about how those rules should be interpreted or applied, and to conform interpretations to appropriate economic analysis. Further, to the extent that existing rules fail to send the appropriate economic signals, the Commission should modify them.

Turning to specific service categories:

Broadband. Broadband services are offered in two sub-markets: the mass market, which includes such offerings as cable modem, satellite broadband, terrestrial wireless, DSL, and fiber to the home-based services; and business services, which include ATM and frame relay.

Looking first at mass market broadband services, the Commission must consider the vibrant inter-modal competition and the ILECs' role as insurgent competitors. Upon doing so, both the language of the Act and its animating policy goals effectively compel the Commission to eliminate unbundling of all broadband elements – including line-sharing, packet switching, and deep fiber loops – and not to identify any new broadband UNEs, such as DSLAMs and "unified" loops. The same holds true in the market for business broadband services, where the large IXCs are the dominant suppliers across the country and the ILECs' role is negligible. Such policies will best achieve Congress's objectives of promoting facilities-based competition and the deployment of advanced services and capabilities.

Traditional dedicated services. Traditional dedicated services include special access services provided primarily to long distance carriers and CMRS providers, and dedicated transport and high-capacity loops provided in connection with the offering of competitive local services (as well as inter-modal equivalents such as fixed wireless, cable-based services, and free space optics). There is no basis for mandating unbundling of UNEs or combinations of UNEs to replace special access. All manner of carriers are competing successfully either using their own facilities, third-party alternatives, or the ILECs' tariffed special access services. Indeed, facilities-based competitors already have captured more than one-third of the special access market and competition is so extensive that ILECs are eligible for pricing flexibility in MSAs accounting for the vast majority of their special access revenues.

Nor is there any basis for unbundling dedicated transport and high-capacity loop UNEs for the provision of competitive local services. The CLECs' claims of impairment for transport and high-capacity loops rest largely on the massive costs of replicating the ILECs' existing networks – a red herring if ever there was one, since demand for services using these elements is

highly concentrated. The widespread and growing deployment of competitive fiber shows that CLECs and wholesale carriers can and do build their own facilities where demand warrants, in both urban and rural areas. And, any residual doubt as to impairment is dissipated by the availability of competitively disciplined ILEC special access services, as noted above.

Traditional switched services. Traditional switched services include POTS offerings (and equivalent cable telephony and wireless services) provided in two sub-markets: business and residential. The relevant UNEs for this service category are circuit switching, non-high capacity loops, and databases and signaling.

Circuit switching and, as a result, the UNE-P combination, should be de-listed throughout the country. CLECs are using some 1300 competitive circuit switches to provide service to between 16 and 23 million local lines, including three million residential lines, in wire centers containing approximately 86 percent of the BOCs' access lines. There can be no argument that competitors are impaired without unbundled circuit switching or UNE-P in providing business services. CLECs have captured almost 30 percent of the business market nationwide and have made virtually no use of UNE-P (and none at all of unbundled switching apart from the platform). In addition, cable and wireless providers are both viable substitutes for landline telephone service for business customers.

The same holds true for residential customers, where competition is both inter- and intra-modal. In Verizon's region alone, cable companies already have captured more than one-quarter of the market in numerous areas within New England, Pennsylvania, and Virginia. Moreover, CLEC over-builders such as RCN also are aggressively and successfully competing without the use of Verizon's switches (and loops). And, elsewhere in the country, the experience of CLECs such as GCI (which, using UNE-L, "now serves 40% of all business and residential lines in

Anchorage," and "began service as a CLEC in Fairbanks … in summer 2001, and already has captured 15% of the market") belies claims that mass market competition is impossible without the UNE-P. Supposed obstacles to such competition – hot cuts, collocation, and DLC loops – are irrelevant to the principal competitors in this market (cable companies and wireless providers) and readily overcome in any event, as the marketplace evidence confirms and as is detailed herein.

The evidence also reveals that UNE-P is not used as a stepping-stone to facilities-based competition. In fact, as we demonstrate herein, there is a strong inverse correlation between UNE-P usage and facilities-based competition. Moreover, contrary to AT&T's claims, the large volume of UNE-P usage in New York has not stimulated facilities-based competition. In reality, CLECs deployed 55 of their 73 circuit switches in New York *before* the rise of UNE-P, the vast majority of switches deployed in New York after the rise of UNE-P have been put in place by non-UNE-P CLECs, and CLECs have been deploying more new switches in California (where UNE-P usage is low) than in New York. Indeed, *all* of the nine states that have proportionately more facilities-based lines than New York also have much lower volumes of UNE-P. Finally, and again contrary to AT&T's assertion, ILEC investment most assuredly does not increase as UNE-P volume increases. In short, where UNEs (and the UNE-P in particular) are heavily used, unbundling displaces investment and perpetuates reliance on the ILECs' networks.

UNE-P must be discontinued immediately for new serving arrangements. Doing so will avoid further entrenching an untenable and counter-productive form of "competition" that demonstrably deters investment by both ILECs and CLECs. Existing customers can be converted to UNE-L or resale on a "project" basis, which AT&T concedes has worked well in the business context, but erroneously claims cannot be used for the mass market.

Non-high capacity loops should not be subject to unbundling where both cable telephony and digital CMRS are available. Nor should loops used to serve multiple dwelling units or new developments be unbundled. In both cases, CLECs and ILECs can compete on equal footing. Finally, even AT&T and Sprint agree that there are a multitude of alternatives to unbundled signaling and database access.

Beyond the compelling record evidence of non-impairment, the economic downturn reinforces the need to limit unbundling, rather than compelling additional unbundling as the CLECs suggest. The shake-out in the telecommunications industry has been exacerbated by regulation that improperly favors rapid entry over sustainable, long-term competition. Maintaining UNEs in order to maximize the number of competitors would aggravate matters by undermining economically meaningful competition – propping up companies that, sooner or later, will fail and weakening players that can be effective rivals over the long run. In any event, while all telecommunications providers (including ILECs) are hurting, the CLEC industry is not moribund; rather, as ALTS recently trumpeted, "the most remarkable feature of the CLEC industry in 2001 was this – it continued to grow!" In fact, CLECs invested more than $ 12 billion in 2001 and expanded their access lines by almost five percent in the first quarter of 2002.[1]

II. THE PROPONENTS OF EXTENSIVE UNBUNDLING HAVE PRODUCED NO MARKETPLACE EVIDENCE TO DEMONSTRATE IMPAIRMENT.

Verizon and the other RBOCs have submitted a comprehensive Fact Report reviewing the dramatic deployment of alternative loops, switches, and transport facilities since the last

[1] We do not respond herein to all of the various arguments raised by the proponents of universal unbundling; nor do we reiterate all of the points raised in our opening comments. The failure to address particular CLEC claims indicates only that they are either patently incorrect or that we anticipated and responded to them in our initial filing.

UNE review. In particular, as summarized in Table 1, there has been a tremendous increase in both self-provided and wholesale switches, loops, and transport, and CLECs have made substantial gains in buildings served, market share, investments, and revenues – all in the face of an economic slowdown affecting all facets of the telecommunications industry.

Table 1[2]

CLEC Facility/Competitive Factor	**Year End 1998**	**Year End 2001**
Circuit switches	700	1300
Packet switches	860	1700
Route miles of fiber (local and long haul)	100,000	184,000
Buildings served (on- and off-net)	106,000	330,000
Facilities-based lines	5-6 million	16-23 million
Residential customers served using CLEC switches	80 thousand	3 million
Fiber networks in top 150 MSAs	1100	1800
Collocation arrangements	4300	24,900
Interconnection trunks	2 million	9 million
Minutes exchanged	96 billion	493 billion
Homes with access to cable telephony service	< 2 million	> 10 million
Cable telephony subscribers	n/a	1.7 million[3]
Total CLEC revenues	$8.5 billion	$44 billion
Total CLEC investment	$14.2 billion[4]	$65 billion[5]

[2] All statistics in Table 1 are taken from the 2002 Fact Report except as otherwise noted. *See generally* Comments of Verizon Communications Inc., *Review of Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338, 96-98, 98-147, UNE Fact Report attached as Attachment B (April 2002) ("2002 Fact Report"). All comments referenced herein and cited only by party name were submitted in this proceeding on April 5, 2002, unless otherwise noted.

[3] Cable telephony companies are adding 70,000 customers each month. By 2006, cable telephony is expected to serve more than 10 million circuit-switched lines and almost 5 million packet-switched lines.

[4] Association for Local Telecommunications Services, *Annual Report: The State of Local Competition*, at 11 (April 2002) ("ALTS 2002 Local Competition Report") (figure derived by adding CLEC investment from 1997 ($5.0 billion) and 1998 ($9.2 billion)).

CLEC Facility/Competitive Factor	Year End 1998	Year End 2001
CLEC overall market share (access lines)	3.9 percent[6]	16-20 percent
CLEC business market share (access lines)	Not available	26-33 percent
Percent of population in counties with 3 or more wireless operators	Not available	94 percent[7]
Wireless subscribers	69 million	130 million

In addition, broadband competition has continued to intensify. In the mass market, cable companies (with 7.5 million cable modem subscribers) maintain a greater than two-to-one market share advantage over ILEC DSL services (with 3.3 million subscribers). Upgraded cable systems will pass nearly 90 percent of all U.S. homes by the end of this year; DSL-capable telephone plant, in contrast, is available to fewer than one-half of all homes. Two-way satellite broadband services have just been introduced, and this "fastest growing" technology is expected to have four to five million subscribers by 2005. Broadband services delivered over terrestrial wireless currently reach 55 percent of the population and should reach 90 percent within another two years. And new technologies, including power line communications, 3G wireless, and

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[5] *Id.* at 11 (this figure was calculated by adding the CLEC investment from 1997 ($5.0 billion), 1998 ($9.2 billion), 1999 ($16.8 billion), 2000 ($21.7 billion), and through the third quarter of 2001 ($12.3 billion)).

[6] *Id.* at 9.

[7] *See Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Seventh Report and Order, FCC 02-179, at 5 (rel. July 3, 2002). Eighty percent of the population lives in counties with five or more mobile telephone operators. *Id.* Notably, eighteen percent of users in a recent survey considered their wireless phone to be their primary phone. Verizon at 125-26. Another recent survey, by Solomon-Wolff Associates, found that, in the last three years, spending by wireless subscribers has increased nine dollars per month, while spending by local phone subscribers has declined seven dollars per month. That survey also found that ten percent of customers use wireless for most local calls and three percent use wireless for all local calls. *See Communications Daily*, June 11, 2002, at 5.

unlicensed "Wi-Fi" systems, imminently will provide additional alternatives that, in the view of some industry participants, "could make cable or D.S.L. connections obsolete."[8] The business broadband market continues to be dominated by the large IXCs; ILECs collectively account for less than 20 percent of the national market for ATM and frame relay services.

In assembling the Fact Report, we made every effort to be conservative, and the CLECs' own submissions, scant though they are, show that we succeeded. On all major competition-related criteria, the CLECs' numbers either parallel our own, or in certain key instances, show even greater availability of alternative facilities:

[8] *See* John Markoff, *2 Tinkerers Say They've Found a Cheap Way to Broadband*, N.Y. Times, June 10, 2002, at C1 (reporting that a company called "Etherlinx" has "taken the 802.11b standard and used it to build a system that can transmit Internet data up to 20 miles at high speeds – enough to blanket entire urban regions and make cable or D.S.L. connections obsolete"). Etherlinx customers require only a repeater antenna that costs less than $150. The service is being trialed in Oakland, California.

Table 2

Facility/Statistic	2002 Fact Report	CLEC Data
CLEC packet/data switches	1700	9524[9]
CLEC circuit/voice switches	1300	1244[10]
CLEC network route miles	184,000	339,501[11]
Homes with access to cable telephony	>10 million	11.7 million[12]
Cable telephony subscribers	1.7 million	1.9 million[13]
CLEC capital investment since last UNE review	$50 billion	$50.8 billion[14]

Consequently, while the CLECs may dispute the inferences that we draw from our data, they cannot reasonably criticize the data's accuracy.

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[9] AT&T at 50; ALTS 2002 Local Competition Report at 16. In addition, as of the third quarter 2001, ALTS states that another 224 data switches were planned. *Id.*

[10] AT&T at 50; ALTS 2002 Local Competition Report at 16 (noting that an additional 92 circuit switches were planned).

[11] ALTS 2002 Local Competition Report at 17. ALTS does not specify whether these network route miles are fiber. However, its report indicates that the CLECs' networks are "high-speed state-of-the-art networks [that] carry the next generation of voice and data traffic," strongly suggesting that they are fiber.

[12] Richard Chandler et al., *The Technology and Economics of Cross-Platform Competition in Local Telecommunications Markets* at 23 (Apr. 4, 2002) attached as Attachment A to WorldCom ("WorldCom HAI Report").

[13] AT&T at 57-61; WorldCom at 35-36.

[14] ALTS 2002 Local Competition Report at 11 (figure is derived by adding CLEC capital expenditures for 1999, 2000, and 2001 – $ 16.8 billion, $ 21.7 billion, and $ 12.3 billion, respectively).

What is most remarkable about the CLECs' submissions is their effort to keep hard deployment statistics beyond the general numbers noted above from the Commission. Fewer than one-third of the 62 CLECs that submitted comments either individually or jointly bothered to provide any data regarding their own use of alternatives to unbundled elements. In many cases, the CLECs simply state that it is impractical or even impossible to deploy their own facilities, or that nothing has changed in the three years since the last UNE review.[15] They then conclude that the full suite (or an expanded set) of UNEs must remain available. Some go even further; Covad, for example, claims that ILECs "must make all facilities in their networks available to requesting carriers,"[16] ignoring the Supreme Court's admonition that such "blanket access" is incompatible with Congress's decision to include Section 251(d)(2) within the statute.[17]

In any event, far from demonstrating impairment, the CLECs' data (disclosed either in this proceeding or to the SEC) confirm that, in a wide variety of circumstances, CLECs are competing using their own or third-party facilities. AT&T alone has 115 local switches, 17,000 fiber route miles, collocation in over 1000 ILEC end offices (not counting substantial additional collocation arrangements acquired from NorthPoint),[18] and direct connections to some 6000

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15 *See, e.g.*, Progress Telecom at 14 (the "factual predicates upon which the Commission based its findings and conclusions roughly two years ago have not changed.").

16 Covad at 45.

17 *AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 390 (1999) ("*Iowa Util. Bd*.") ("if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with [in the *Local Competition Order*], it would not have included section 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided.").

18 AT&T at 52-53; Declaration of Michael E. Leshar and Robert J. Frontera, ¶ 45 (April 1, 2002) attached as Attachment E to AT&T ("AT&T Lesher/Frontera Decl."). AT&T also reports switch deployment statistics for numerous other CLECs. AT&T at 48-52.

commercial office buildings.[19] (In addition, AT&T offers cable telephony to millions of customers in our region alone, and Cox has been similarly aggressively offering service in other areas and is able to serve up to 95 percent of the state of Rhode Island).[20] GCI has gained 40 percent of the market in Anchorage using its own switches and has amassed a 15 percent market share in Fairbanks using a switch-based strategy in less than one year.[21] XO has over 22,200 route miles and almost 2400 on-net buildings.[22] Time Warner Telecom's network covers 16,806 route miles and offers service to 10,685 on-net and off-net buildings in 44 markets.[23] Covad admits that it obtains 50 percent of its interoffice transport from competitive carriers.[24] Conversent concedes that "it can and does procure and install dark fiber" and that it uses third-party fiber providers.[25] Without providing actual numbers, the CLEC Coalition boasts that its

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19 AT&T Lesher/Frontera Decl., ¶ 41.

20 2002 Fact Report, II-11-12; *see also* Cox Communications April 16, 2002 Press Release "Cox Communications Surpasses Half Million Customers for Residential Digital Telephone Service" http://www.cox.com/PressRoom/default.asp?LocalSys=Corporate&dName=In+Your+Area (quoting President and CEO Jim Robbins stating that "[t]his is a remarkable achievement that demonstrates tremendous growth in a relatively short period and validates our strategy for entering the telephony business").

21 GCI at 3-4

22 XO Communications, SEC Form 10-K for the year ending December 31, 2001, at 43 ("XO 10-K").

23 Time Warner Telecom, Inc. SEC Form 10-K, for the year ending December 31, 2001, at 3, 25 ("TWT 10-K").

24 Covad at 67-69. Similarly, ALTS concedes that alternatives to ILEC interoffice facilities are available in approximately 15 percent of wire centers. ALTS at 63-64. As the pricing flexibility data make clear, those wire centers undoubtedly account for the vast majority of dedicated transport volume; 20 percent of Verizon's wire centers, for example, generate 80 percent of our dedicated transport revenue.

25 Conversent at 9.

members have deployed fiber, digital circuit switches, packet switches, frame relay switches, ATM switches, soft switches, routers, collocation arrangements, and back-office infrastructure.[26]

The record also confirms that CLECs deploy advanced technology more commonly than the ILECs. For example, Dynegy proclaims that its "innovative" network is the "first" to include Tellium optical switches and to deploy top-of-the-line Fujitsu dense wave division multiplexing optical equipment in a full-range network build out.[27] And Corning notes that CLECs pass 26,000 homes with fiber, while BOCs have deployed fiber loops to only a few hundred homes.[28]

As the Commission itself has correctly recognized (and the D.C. Circuit has confirmed), the Commission cannot make a generalized impairment finding based on this record. Rather, it must find the opposite – that, given the substantial deployment of alternative facilities in a wide variety of geographic locations, CLECs are not impaired unless they submit evidence to the contrary in particular circumstances. To date, they have failed to do so.

III. UNBUNDLING DETERS INVESTMENT BY ILECS, CLECS, AND OTHER PLATFORM PROVIDERS

There can be no doubt that "[u]nbundling requirements that are too broad destroy an incumbent's incentive to invest in facilities" and that "new entrants will have diminished incentives to invest in their own facilities if the incumbent's network is readily available at below cost rates."[29] This common sense assertion is shared by the Commission, other facilities-

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26 CLEC Coalition at 3.

27 Dynegy at 2-3.

28 Corning at 4, 20.

29 Remarks of Commissioner Kathleen Q. Abernathy at the USTA Annual Convention, Oct. 7, 2001, http://www.fcc.gov/Speeches/Abernathy/2001/spkqu103.html (last visited July 16, 2002); *see also* Remarks of Commissioner Kevin J. Martin at the National Summit on Broadband Deployment, "Framework for Broadband Deployment," Oct. 26, 2001, http://www.fcc.gov/Speeches/Martin/2001/spkjm101.html (last visited July 16, 2002) ("new entrants have little incentive to build their own facilities, since they can use the incumbents'

based carriers, financial and industry analysts, high-tech industry groups, manufacturers, the National Research Council, and numerous economists.[30] Even AT&T, the most vociferous supporter of unbundling, has acknowledged the basic truth that "[n]o company will invest billions of dollars to become a facilities-based … provider" if other companies "that have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investment and risks of others."[31] Thus, as the D.C. Circuit has confirmed, there is no question that "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities"[32] and that these disincentives affect "both ILECs and CLECs."[33]

These conclusions follow naturally from the Supreme Court's holding in *Iowa Utilities Board* that the Commission must limit unbundling in order to promote the core goals of the Act, as well as from the recent *Verizon* opinion. In *Verizon*, the Supreme Court upheld TELRIC as a

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cheaper and more quickly. And incumbents have some disincentive to build new facilities, since they must share them with all their competitors.").

30 Verizon at 25-29; *see also* Stephen Pociask, *Putting Broadband on High Speed: New Public Policies To Encourage Rapid Deployment*, Economic Policy Institute, July 2002, at 5, http://www.epinet.org ("ILECs are discouraged from investing in high-speed services because of asymmetric regulations that require them to lease their network facilities to competitors at prices that do not fully recover costs. When businesses cannot recoup the costs of their investments, they are discouraged from investing, and consumers lose.").

31 Remarks of C. Michael Armstrong, Chairman and CEO, AT&T, before the Washington Metropolitan Cable Club, Washington, D.C, "Telecom and Cable TV: Shared Prospects for the Communications Future," (Nov. 2, 1998) http://www.att.com/press/1198/981102.chc.html (last visited July 17, 2002) ("Armstrong 1998 Speech")

32 *United States Telecommunications Association v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA*").

33 *Id.* at 429.

permissible exercise of the Commission's discretion in the area of pricing.[34] It did so, however, based on the premise that the pricing rules applied only to true "bottleneck" facilities: the Court repeatedly referred to "bottleneck elements," "bottleneck facilities," "facilities that are very expensive to duplicate," and "some costly-to-duplicate elements [that are] necessary to provide a desired telecommunications service."[35] And the Court expressly recognized that, while some elements, such as loops, may continue to fit this description (at least under some circumstances), other "more sensibly duplicable" elements such as switches or multiplexers may not.[36] Against this background, we explain below that the Act's requirement that unbundling be limited is necessary to assure achievement of Congress's core goals of promoting facilities-based competition and investment.

A. The comments of the high-tech industry confirm beyond any dispute that unbundling diminishes investment by all industry players.

High-tech industry manufacturers and trade associations, whose interests are merely to ensure the deployment of broadband by all types of competitors (and who have no reason to take sides with either the ILECs or CLECs in the unbundling debate), make clear that unbundling diminishes the overall level of investment.[37] As various manufacturers attest, ILEC investment has been adversely affected by expansive unbundling obligations.

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[34] *See Verizon v. FCC*, 122 S.Ct. 1646, 1678 (2002) ("*Verizon*"); *id*. at 1687 ("Whether the FCC picked the best way to set these rates is the stuff of debate for economists and regulators versed in the technology of telecommunications and microeconomic pricing theory").

[35] *Id*. at 1672 & n.27.

[36] *Id.* at n.27 ("entrants may need to share some facilities that are very expensive to duplicate (say loop elements) in order to be able to compete in other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology)").

[37] Although the high-tech industry's comments focus on broadband, narrowband investment suffers the same destructive effect, because unbundling saddles ILECs with all the risk of investing but compels them to share much of the gain.

For example, Catena Networks, a developer of advanced communications systems, has developed technology that allows DSL to be deployed in certain types of remote terminals.[38] Although this technology has been successfully tested by most large ILECs, those companies "have expressed reluctance to deploy this product because of the current regulatory uncertainty over unbundling, pricing and access. Moreover, other Catena customers are choosing to deploy new products in some states within their territories, but not others, because of specific or proposed regulatory treatment by State commissions."[39] Alcatel echoes these concerns, concluding that state inquiries into line card unbundling "cause carriers to delay or cancel capital investment in NGDLC systems until a determination is made" on unbundling obligations.[40] Similarly, Next Level, a manufacturer of DSL equipment, explains that, while Qwest has made use of Next Level's VDSL platform, Qwest has limited its deployment because of the unbundling rules.[41] Conversely, smaller independent ILECs not subject to the UNE requirements are making greater use of Next Level's product.[42]

The deterrent effect of unbundling is also dampening deployment of the next generation of broadband. The Fiber-To-The-Home Council ("FTTH Council") finds that, even though fiber-to-the-home ("FTTH") solutions compare favorably to copper or coaxial solutions in terms of installation costs, maintenance costs, and revenue-generating opportunities, ILEC FTTH accounts for only three percent of total deployment nationwide and less than one percent of all

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38 Catena at 5.

39 *Id*. at 5-6.

40 Alcatel at 30.

41 Next Level at 5.

42 *Id*. at 6-7.

access lines.[43] Compelling evidence of the effect of unbundling on investment is provided by Corning, which shows that "[t]he biggest obstacles to faster deployment of FTTH are the unbundling and wholesale resale pricing guidelines that currently apply to these (and other) network elements" and that "[a]llowing competitive carriers to access these new systems at forward-looking incremental cost, while forcing ILECs to shoulder all of the risk associated with their deployment, changes the cost/benefit analysis for ILECs in such a way that these companies are unwilling to overbuild advanced fiber technology in many areas where they would otherwise do so."[44]

Based on a study using actual expense and investment data, Corning concludes that current UNE regulations would eliminate approximately 84 percent of the ILEC fiber overbuilds that would otherwise occur, reduce FTTH penetration from 31 to 5 percent, and eliminate $ 39 billion in ILEC investment.[45] In such an environment, the substantial investment required to provide broadband services "would be contrary to their [the ILECs] fiduciary duty and potentially a disservice to [their] shareholders."[46] The same holds true for all broadband investment, not just fiber to the home.

Unbundling deters investment by all competitors. As Alcatel explains, "in the past three years, competitive providers have insufficiently migrated onto their own facilities and remain overly-reliant on the ILECs' network…. The UNE and pricing rules have created an entitlement for the competitive telecommunications providers in which it is more advantageous to rely on the incumbent's network rather than expose themselves to the financial risk associated with network

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43 FTTH Council at 1-4.

44 Corning at 3.

45 *Id*. at 5-6.

46 Alcatel at 11.

construction."[47] Undeniable proof of the effects of unbundling on CLECs is the deployment of fiber to the home. FTTH Council notes that CLECs "have only chosen to build their own FTTH network in situations where they could not resell ILEC DSL services."[48] This is consistent with Corning's study, which found that CLECs have passed approximately 26,000 homes with fiber to the home while BOCs have passed only 400.[49] Thus, where ILECs do not have facilities, such as fiber to the home, CLECs are willing and able to deploy their own. Conversely, when CLECs can use UNEs, they do.

Unbundling also discourages inter-modal broadband investment. HTBC concludes that, "[b]ecause xDSL is a competitor to cable, wireless, and satellite broadband services, if ILECs do not invest in broadband deployment and innovative technologies, other broadband providers may have less incentive to make investments in their own technologies. For example, without competition from xDSL initiatives, such as Project Pronto, cable companies have fewer incentives to devote resources to creating higher bandwidth cable broadband services."[50] The Progress and Freedom Foundation confirms this analysis, finding that, by discouraging investment for ILECs and CLECs, the unbundling rules "create for builders of other platforms the opportunity to save costs (thereby creating value) from delaying the rollout of improved networks."[51]

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47 *Id*. at 10.

48 FTTH Council at 6.

49 Cambridge Strategic Management Group, *Assessing the Impact of Regulation on Deployment of Fiber to the Home: A Comparative Business Case Analysis*, at 51 (Apr. 5, 2002) attached as Attachment A to Corning ("CSMG Study ").

50 HTBC at 33.

51 P&F Foundation at 31.

B. CLEC claims that unbundling acts as a transition mechanism and does not deter investment are unsupported and wrong.

Try as they might, the CLECs cannot alter economic reality. Unbundling deters investment, not just by ILECs, but also by CLECs, cable companies, wireless carriers, and all other platform providers. Accordingly, UNEs must be made available only where the benefit of doing so, in terms of facilitating competition that otherwise could not develop, outweighs the destructive impact on investment and innovation.[52]

Undeterred by common sense or basic economic theory, the CLECs purport to show that unbundling actually promotes investment by both CLECs and ILECs. To this end, they claim that unbundling is used as a transition mechanism to build up a sufficient customer base to justify investment, making an analogy to the development of long distance competition, and that the availability of UNEs prevents wasteful duplication of facilities. They could not be more wrong.

1. Unbundling has not been used as a mechanism to build traffic to justify investment in facilities.

Assertions that CLECs must build a customer base before investing in their own facilities are without foundation.[53] New entrants into other industries with high fixed costs have been successful without access to the network elements of their competitors. For example, direct broadcast satellite providers deployed their satellites and other equipment without using competing cable networks to build up customers in advance.[54] Allowing CLECs to access ILEC UNEs at low TELRIC pricing when facilities-based entry is already occurring encourages new

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52 *See USTA*, 290 F.3d at 427-28.

53 *See, e.g.*, AT&T at 38-43, 220-24; CompTel at 13-14; CLEC Coalition at 10-11; Talk America at 12, 14.

54 Reply Declaration of Dr. Howard Shelanski, attached hereto at Attachment A, ¶ 4 ("Shelanski Reply Decl.").

entrants to use UNEs, disadvantages entrants who have already deployed their own facilities, and deters investment by both ILECs and CLECs.

Given all the rhetoric on this issue, the Commission should expect dozens of anecdotes explaining how, when, and where the CLECs have transitioned from UNEs to their own facilities. The record, however, reflects nothing of the sort.[55] Although AT&T states that it has migrated some business customers from UNE-P to its own switches, there is no evidence that any CLEC has used or ever intends to use UNE-P (or any other UNE) as a transition strategy for mass market customers.

Certainly, carriers such as WorldCom and AT&T have garnered enough mass market customers to justify conversion to their own switches. In New York alone, for example, these two carriers have well over one million UNE-P customers.[56] They also have more than enough switches to handle this volume; AT&T had 17 switches in New York as year end 2001,[57] and it bemoans the fact that those switches are underutilized.[58] Neither AT&T nor WorldCom, however, has made any move to transition these customers – even though AT&T concedes that converting to UNE-L on a project basis works very well in the business market.[59]

The reality is that there is no obstacle to switch-based competition in the mass market. The true problem is that UNEs "allow entrants to avoid the costly facilities route to market entry

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55 Reply Declarations of Drs. Alfred E. Kahn and Timothy J. Tardiff, attached hereto at Attachment B, ¶ 20 ("Kahn/Tardiff Reply Decl.").

56 2002 Fact Report II-17. Interestingly, while several CLECs claim that UNE-P will be used to build up a sufficient customer base to justify a transition to their own facilities, no CLEC states exactly where the crossover point is. AT&T's and WorldCom's track record in New York suggests that CLECs will never think there is enough volume to justify a transition.

57 UNE-P and Investment, attached hereto at Attachment C, at 5.

58 AT&T at 217-18.

59 *Id*. at 56-7.

and instead use the less costly option of 'easy riding' on incumbent networks."[60] That some CLECs like it that way is understandable, but irrelevant. Congress intended that UNEs be used as a transition mechanism, not as an excuse to avoid investment.

Finally, the CLECs' analogy to the development of long distance competition is inapposite. AT&T, for example, contends that "[u]nfettered access to UNEs … led, over three decades, to today's highly competitive long distance market."[61] This is preposterous. AT&T was never required to unbundle its long distance network. Rather, carriers were able to purchase access on a resale basis at prevailing market prices for large customers. "The competitive Specialized Common Carriers used transmission capacity obtained under dramatically discounted, but still fully cost consistent, bulk rate tariffs offered by AT&T to the trade, combined with dramatically 'inferior' access to local networks."[62] Because the rates paid by the competitors were compensatory, AT&T was still left with an incentive to upgrade its network and the competitors were encouraged to build out their own networks. Indeed, if the long distance experience proves anything, it is that a customer base can be built up through resale rather than needing to rely on pieced-apart (or re-assembled) elements of the incumbent's network.

Another significant distinction between the development of long distance competition and the Commission's unbundling regime is that the new long distance entrants used their savings "to leap frog the existing largely analog, voice optimized, circuit switched network and

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60 P&F Foundation at 29.

61 AT&T at ii.

62 P&F Foundation at 29-30, n.50.

invest instead in lower cost, higher quality, more service-versatile digital networks."[63] In contrast, the Commission's rules requiring unbundling at below-cost rates give CLECs the incentive to continue to rely on ILEC networks rather than investing in their own facilities.[64]

2. CLEC facilities deployment is not wasteful duplication.

Perhaps the most bizarre argument advanced in defense of unlimited unbundling is that it purportedly prevents CLECs from wastefully duplicating ILEC networks.[65] As an initial matter, this claim is at odds with the concession by many CLECs that unbundling was intended as a transition to facilities investment – not as a permanent competitive feature. It also incorrectly assumes that all aspects of local telephone service are a natural monopoly – a market in which one firm can produce all the market can absorb and continually expand its capacity at less cost than any new firm entering the market.[66] Congress forcefully rejected this assumption in the 1996 Act, by establishing a "pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[67]

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63 *Id*.

64 Relatedly, even if access to ILEC legacy facilities could still somehow be justified, which it cannot, "if the same rules are now applied to the most advanced networks of incumbents, there is nothing to leap frog and little incentive to build more modern plant, because entrants are already getting such facilities – without risk – at or below the cost of making service available from facilities-based networks they would build, own and operate themselves without relying on elements of incumbent networks." *Id.*

65 ALTS at 18-19, 44-45; Eschelon at 10-11.

66 As antitrust scholars have pointed out, "in a meaningful sense, competition [in a natural monopoly] is self-destructive." C. Kaysen & D. Turner, Antitrust Policy: An Economic and Legal Analysis 191 (1959) (quoted in *Smith v. Pro Football, Inc*., 593 F.2d 1173, 1195 (D.C. Cir. 1978)).

67 H. Rep. No. 140-458, 104th Cong., 2nd Sess. 1 (1996).

In any event, as Dr. Shelanski explains, market facts refute the notion that CLEC duplication of ILEC facilities is economically wasteful. First, in order for that to be true, such investment must raise the total cost of serving existing and anticipated demand for local exchange and exchange access services. Second, the benefits from facilities-based entry must not offset those increased costs. Neither condition applies here.[68]

The likelihood that facilities-based investment will increase the overall costs of service decreases as market demand grows and technology evolves. With increased demand for new or existing services, new facilities are required to serve customers, and new entrants may be able to serve customers as efficiently as the incumbent provider. With improved technology, more efficient facilities are needed, and new services must be deployed. Even if demand remains constant, the likelihood that new investment will be duplicative decreases. In fact, new entrants may enjoy advantages over incumbents in deploying new technologies.[69]

Since 1996, there have been improvements in technology that favor investment by new entrants. In addition, the kinds of services consumers demand have changed. Data traffic now exceeds voice traffic, and the need for broadband services is rising steadily. Between mid-1999 and mid-2001, broadband consumption grew from an estimated 160,000 DSL lines and 1 million cable modem subscribers to 3 million DSL lines and 5.2 million cable modem subscribers. New investment, including additional fiber, packet switching, DSLAMs, and NGDLC technology, which does not duplicate existing capabilities, is required to meet these needs.

Moreover, even if building an entirely new, ubiquitous wireline network were not justified, that does not imply that building particular elements (or even major portions) of a

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68 Shelanski Reply Decl., ¶¶ 14-16.

69 *Id.* at ¶ 3.

network would be wasteful, or that it would be wasteful to adapt existing cable or wireless networks to provide competing telephony services. While it might not currently be economically feasible to build new loops to residential consumers in some areas, it still would be efficient to deploy switching and transport facilities to serve those same customers, and to deploy loops as well in many other locations.[70] And cable and wireless facilities already exist virtually everywhere.

That so many CLECs are constructing their own facilities demonstrates that such investment often is efficient. In the BOC regions alone, CLECs provide between 11 and 19 million business loops using their own facilities.[71] CLECs also are overbuilding ILEC facilities to serve mass-market customers, deploying broadband pipes to neighborhoods or MDUs through which they provide a bundle of services including basic voice.[72] In addition, cable telephony and CMRS service are direct substitutes for traditional telephony even in areas where it might not be economical to build duplicate telephony loops. Almost two million customers already receive telephone service through cable facilities,[73] and this number is expected to increase to 2.4 million by the end of this year and to 15 million by 2005.[74] Similarly, approximately 18 percent of CMRS subscribers use their mobile phone as their primary phone,[75] between 3 and 5 percent of

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70 *Id.* at ¶ 15.

71 2002 Fact Report IV-2 and Table 1.

72 *Id.*, IV-15-16 and IV-18, Table 5. These strategies have been successful. For example, RCN has built out its network to pass more than 1.5 million homes, and, in the fourth quarter of 2001, added nearly 47,000 new subscribers. *Id.*, IV-15-16.

73 2002 Fact Report II-11.

74 *Id*.

75 *See* M. Kessler "18% See Cellphones as Their Main Phones," *USA Today*, Feb. 1, 2001, at B1.

wireless subscribers have abandoned their wireline phones,[76] and VoiceStream estimates that this percentage will rise to "11 percent by 2006, and to a strong, and perhaps overwhelming, majority share by 2012."[77]

Nor is there any real dispute that the consumer benefits from facilities-based competition will offset any conjectured "waste" from duplication. When CLECs use their own facilities, they have strong incentives to reduce production costs, increase output, and provide innovative services. Moreover, when faced with competition from facilities-based rivals, incumbents have similar incentives to cut costs and innovate.

C. Where unbundling remains, pricing rules should be economically appropriate.

Of critical importance, where the Commission does retain unbundling requirements, it should clarify and modify the UNE pricing rules to make sure they conform to sound economics. While the Supreme Court decision establishes the Commission's authority with respect to UNE prices, it does not resolve how that authority should be applied. There continue to be wide ranging views as to the meaning of TELRIC, many of which – including some state arbitration decisions – are inconsistent with the views expressed by the Commission before the Supreme Court. As recognized by many prominent economists, including Drs. Kahn[78] and Shelanski,[79]

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[76] 2002 Fact Report IV-14, *citing Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Sixth Report*, 16 FCC Rcd 13350 ¶ 32, n.207 (2001) ("Sixth CMRS Competition Report").

[77] Reply Comments of VoiceStream, *Performance Measurements and Standards for Special Access Services et al.*, CC Docket Nos. 01-321, 00-51, 98-147, 96-98, 98-141, 96-149, 00-229 at 18 (filed Feb. 12, 2002), *citing* Cnet News.com, *Study: Consumers Go Wireless at Home,* Jan. 29, 2002.

[78] *See, e.g.*, Kahn/Tardiff Reply Decl., ¶ 47.

the Commission needs to both clarify the existing pricing rules and in some circumstances modify them, in order to assure that the investment-sapping effects of unbundling are no broader than necessary[80] and to correct serious and increasingly pervasive misinterpretations of the TELRIC standard. Such action is both germane to this proceeding and well within the scope of the NPRM, which specifically inquires about potential clarifications or modifications of the pricing rules.[81]

In particular, as detailed in a letter submitted to Chairman Powell on July 16,[82] the Commission should clarify five aspects of TELRIC:

- The cost of capital should be no lower than that employed by competing providers, since TELRIC is supposed to represent costs that would be faced in a fully

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(Continued . . .)

79 *See, e.g.,* Testimony of Dr. Howard Shelanski on Behalf of Verizon Virginia Inc., *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Expedited Preemption of the Jurisdiction of the Va. State Corp. Comm'n. Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket No. 00-218 *et al.* (July 31, 2001).

80 As the D.C. Circuit noted, in determining whether a CLEC is impaired, "the closer the Commission's pricing principle is to the low end of what it may lawfully set, the greater the probability that lack of access would cause 'material diminution.' As a result low UNE prices would not only have the direct effect mentioned in the text [deterring investment], but would inherently tend to expand the sphere of these effects." *USTA*, 290 F.3d at 424 n.2. There can be no doubt that current UNE rates are set at the low end of the range of TELRIC-compliant rates. For Verizon, according to one analyst, the average full UNE-P rate is just under twenty dollars – a discount of 32 percent off our average cash cost per line, and 61 percent below our total costs per line, not including the cost of equity. Anna-Maria Kovacs, "The Statue of 271 and UNE-Platform in the Regional Bells' Territories" (Commerce Capital Markets, April 15, 2002), at 10. "For all RBOCs, UNEs are priced below cash operating cost, and radically below total operating cost, including depreciation and amortization." *Id.* Such aggressively low pricing not only deters facilities investment by CLECs, but seriously compromises the ILECs' ability and incentive to maintain and upgrade their networks.

81 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, Notice of Proposed Rulemaking, ¶ 24, CC Docket 01-338 (rel. Dec. 20, 2001) ("*NPRM*").

82 *See* Letter from William P. Barr, Executive Vice President and General Counsel, Verizon, to Michael K. Powell, Chairman, FCC, dated July 16, 2002, attached hereto at Attachment D.

competitive market. The cost of capital also should include an appropriate factor to take into account uncollectibles.

- The starting point for depreciation should be the same lives that are used for financial reporting purposes.
- It is inappropriate to assume the use of technologies that are not currently available and the instantaneous replacement of all current inputs.
- Existing fill factors represent a reasonable estimate and are likely to decrease over time as traffic is diverted to the networks of inter-modal competitors.
- Carriers are entitled to recover the non-recurring costs they incur to make unbundled elements available.

In addition, the Commission should modify its rules to eliminate the assumption that the existing network is "reconstructed" to reflect a technology mix that goes beyond what likely will ever be deployed in any real-world network. A more economically correct approach would be to consider what the network is expected to look like during a reasonable, forward-looking planning period (e.g., three to five years).

IV. THE CLECS' PROPOSED "ALL UNBUNDLING, ALL THE TIME" REGIME IS UNLAWFUL.

In the CLECs' view, the expansive approach to unbundling in the UNE Remand Order must be continued in perpetuity. To hear the CLECs tell it, a UNE cannot be de-listed anywhere unless alternatives are available everywhere[83]; the ability of some entities to compete using alternatives is irrelevant to the impairment inquiry[84]; impairment exists unless there are at least four non-ILEC sources of supply[85]; the fact that consumers enjoy competition in the provision of

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83 *See, e.g.*, CLEC Coalition at 31-32, 53; UNE Platform Coalition at 21-22.

84 *See, e.g.*, CompTel at 60-61; SWCTA at 14.

85 Allegiance at 9-10.

retail services is of no moment in considering impairment[86]; and UNEs must remain available even in the absence of impairment just so competitors can have a choice of entry options.[87]

There is no legal or policy basis for these positions. The *Iowa Utilities Board* decision requires the Commission to establish a genuine "limiting standard rationally related to the goals of the Act."[88] And the Commission itself has recognized that Section 251(d)(2) requires it to "consider the markets in which a competitor 'seeks to offer' services and, at an appropriate level of generality, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services."[89] Likewise, the Commission has emphasized that "it is appropriate to consider the specific services and customer classes a requesting carriers seeks to serve when considering whether to unbundle a network element,"[90] and that "section 251(d)(2) does not compel us, once we determine that any network element meets the 'impair' standard for one market, to grant competitors automatic access to the same network element solely or primarily for a different market."[91] The *USTA* decision confirms the validity of the Commission's conclusions.

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86 ALTS at 39-40; CompTel at 60.

87 CompTel at 12; UNE-Platform Coalition at 38-39.

88 *Iowa Util. Bd.*, 525 U.S. at 388.

89 Brief of FCC, *Competitive Telecommunications Association v. FCC*, No. 00-1272 (D.C. Cir. filed Feb. 19, 2002) (*"CompTel v. FCC")*, quoting *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Supplemental Order Clarification, 15 FCC Rcd 9597, 9595 (2000) (*"Supplemental Clarification Order"*)(internal quotations marks omitted).

90 *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 98-147 ¶¶ 31-32 (rel. Dec. 9, 1999) ("*Line Sharing Order*").

91 *Supplemental Order Clarification*, 9595; *see also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and

In the remainder of this section, we outline the proper scope of the impairment analysis and refute the CLECs' principal contentions in favor of unbounded unbundling.

A. The unbundling analysis must be service-specific, market-specific, and must consider customer characteristics.

As noted above, the Commission already has recognized that the impairment analysis must take into account the specific services requesting carriers seek to provide, the locations where they wish to provide service, and the customers they desire to serve.[92] Given the substantial deployment of alternative facilities by a multitude of different providers in a wide variety of geographic areas, a generalized presumption of impairment cannot be reconciled with the marketplace evidence or the dictates of the Act. As Dr. Shelanski notes, "[g]iven the diversity of service and market characteristics in local telecommunications today, it is impossible to make a 'one size fits all' determination of competitive impairment for local exchange services nationwide."[93] To the contrary, the extensive availability of non-UNE alternatives compels the Commission to find that requesting carriers are not impaired without the vast majority of UNEs, absent evidence to the contrary in particular circumstances.

Not surprisingly, most CLECs disagree, arguing that UNEs must be made available for any purpose (regardless of the competitiveness of the service they seek to offer), in any location (regardless of the existence of alternative facilities), and to any customer (regardless of the options that customer already enjoys). They are wrong on all counts. Congress provided that the unbundling obligation applies, if at all, only where requesting carriers are impaired. The record

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(Continued . . .)
Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3737-38, 3743 (1999) (*"UNE Remand Order"*).

92 Verizon at 38-42.

93 Shelanski Reply Decl., ¶ 18.

precludes such a finding with respect to many services, virtually all geographic locations for some UNEs (and a considerable number of areas for others), and, depending on the UNE, all or certain types of customers.[94] The Commission's job in this proceeding, therefore, is to determine the particular circumstances under which impairment still exists, based on marketplace evidence rather than conjecture and saber-rattling.

1. The impairment analysis is, by necessity, service-specific.

Numerous CLECs argue that the Commission cannot engage in a service-specific impairment analysis (or, as some put it, impose use restrictions on UNEs), asserting that any limit on the use to which a UNE may be put contravenes Section 251(c)(3), the definition of "network element," the nature of impairment (under which a requesting carrier supposedly is impaired with respect to every service if it is impaired with respect to any), and practical considerations.[95] The Commission already has rejected these arguments several times, as noted above, and it must do so again here.

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[94] For purposes of these reply comments, we combine the service-specific and customer-specific aspects of the market analysis because services generally are aimed at particular types of customers. For example, high-capacity loops are provided almost exclusively to large business customers; dedicated transport is provided only to large business customers and IXCs; and almost all demand for ADSL derives from mass market customers. Moreover, the Commission has considered services and customers jointly in assessing impairment. *See Line Sharing Order*, ¶¶ 31-32.

[95] *See, e.g.*, Arch Wireless at 6-7 (no statutory basis); CompTel at 52-53, 90-95 (service-specific analysis is inconsistent with 251(c)(3)); WorldCom at 53-57 (use restrictions violate 251(c)(3), the definition of "network element," and 251(d)(2)); AT&T at 110-13 (service-specific analysis is discriminatory in violation of 251(c)(3); such an analysis makes no sense because impairment exists with respect to all services for which a UNE might be used). These CLECs also contend that a service-specific analysis is inconsistent with various sections of the Commission's rules. None of the cited rules (51.307(c), 51.309(a), and 51.311(a)), however, prevents the Commission (as opposed to an ILEC) from limiting the services for which a UNE must be made available, and any such constraint would violate Section 251(d)(2). Moreover, even if these rules originally were intended to assure that UNEs were available for the provision of any telecommunications service, they pre-date the *Iowa Utilities Board* and *USTA* decisions.

Sections 251(c)(3) and (d)(2). Section 251(c)(3) does not compel that UNEs be made available for the provision of "any" telecommunications service, as the CLECs contend. It imposes a duty to provide access to UNEs for the provision of "a" telecommunications service.[96] Moreover, the general unbundling obligation established by Section 251(c)(3) is limited by Section 251(d)(2), which tasks the Commission with "determining what network elements should be made available for purposes of subsection (c)(3)."[97] As the Commission itself previously has explained, this latter subsection lays to rest any argument that Section 251(c)(3) precludes a service-specific analysis: by directing the Commission to focus the impairment analysis on "the services" that the requesting carrier seeks to offer, that section "allows the Commission, in appropriate circumstances, to reject an all-or-nothing approach that would make network elements available for the provision of all telecommunications services if they are available for the provision of any such services."[98] Contrary to the claims of certain CLECs, Section 251(d)(2) both determines *what* UNEs must be made available and *how* those UNEs may be used. If Congress had intended that UNEs be made available for any and all services, it would not have included this limitation in the statute.

The definition of "network element". There is no basis to the argument that the definition of "network element," which encompasses both "a facility or equipment" and "features, functions, and capabilities that are provided by means of such facility or equipment," precludes a service-specific impairment analysis. As the Commission has stated, this argument "is a non

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96 47 U.S.C. § 251(c)(3).

97 47 U.S.C. § 251(d)(2).

98 Brief of FCC, *CompTel v. FCC*, at 18-19; s*ee also UNE Remand Order*, 3738 (because "[d]ifferent types of customers use different services … it is appropriate for us to consider the particular types of customers that the carrier seeks to serve"); *Line Sharing Order*, ¶ 31 ("it is appropriate to consider the specific services and customer classes a requesting carrier seeks to serve when considering whether to unbundle a network element").

sequitir."[99] Reading the "features, functions, and capabilities" language to encompass the use of an element to provide any telecommunications service would improperly override Section 251(d)(2), and cannot be squared with Section 251(c)(3).

The nature of impairment. Contrary to AT&T's argument, it is hardly illogical to assume that a carrier might be impaired without access to a UNE in providing some services but not others. For example, requesting carriers might be impaired in providing competitive local exchange service to a certain class of customers in certain locations without access to unbundled loops. Those same carriers, however, would not be impaired in providing long distance service to those customers without access to unbundled loops; long distance carriers have successfully competed for years without using UNEs.[100]

Practical considerations. Certain CLECs contend that a service-specific analysis will invite definitional controversies. There is no basis for this concern: the CLECs' poster child for this issue, the local service restriction on the use of "enhanced extended links" ("EELs") is a poor example; the CLECs have only themselves to blame for much of the controversy regarding EELs. CLECs that meet the local service safe harbors have had little difficulty converting special access service to EELs; the problem arises from the efforts of certain CLECs/IXCs to use EELs even though they do not satisfy the safe harbors.[101]

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The Act and the FCC's own precedent compel the Commission to undertake a service-specific impairment analysis. The CLECs' arguments to the contrary must be rejected as

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99 Brief of FCC, *CompTel v. FCC*, at 24.

100 *See also* section VII.A.I, *infra.*

101 *See Net2000 Communications, Inc. v. Verizon,* Memorandum and Opinion, 17 FCC Rcd 1150 (2002). In any event, the EEL issue should be moot because both dedicated transport and high-capacity loops should be de-listed, as discussed below.

attempts to maintain universal unbundling notwithstanding the plentiful evidence of widespread non-impairment.

2. The market-specific analysis required by Section 251(d)(2) must include a geographic component and must dismiss the CLECs' "ubiquity" argument.

Several CLECs urge the Commission not to engage in a geographically granular impairment analysis, contending that (in CompTel's words) "requesting carriers do not enter markets and provide services in a granular way"[102] and that, even if alternatives to UNEs are available in some places, CLECs nonetheless are impaired unless such UNEs are available ubiquitously. Other CLECs at least pay lip service to the need to engage in a geographically refined unbundling analysis, but then assert that there are still not enough alternatives to de-list any UNE anywhere.[103]

Given the evidence of widespread deployment of alternative facilities, the Commission cannot give credence to these claims. The simple fact is that a geographic-specific analysis is necessary, not to determine where CLECs are not impaired, but to identify those few remaining locations where they are impaired. Of course, this does not mean that the Commission must examine the state of competition on a wire center-specific basis in every case. Rather, the Commission can rationally find a generalized lack of impairment for many UNEs – circuit switching, dedicated transport, high-capacity loops, and signaling – in light of both the extensive deployment of alternative facilities across a wide variety of geographic locations and the lack of any showing that there are particular market segments where competing providers would be impaired without access to these elements. Doing so is amply supported both by the record in

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102 CompTel at 51.

103 *See, e.g.*, Allegiance at 7-8; Z-Tel at 23; GCI at 20-23.

this proceeding and by Commission precedent. For example, the Commission repeatedly has identified a single nationwide geographic market for mass market long distance services, rather than a series of thousands of point-to-point markets, because consumer choices are likely to be equivalent regardless of location.[104] Although CLECs might be able to show that particular locations do not have (and more importantly, could not develop) non-ILEC alternatives, none has done so to date.

Entry strategies. CompTel is wrong in suggesting that CLECs do not enter markets in a granular manner and therefore need all UNEs everywhere. The 2002 Fact Report presents indisputable evidence that successful competitors "have grown incrementally, establishing a foothold and then expanding core network facilities step by step into new geographic and product markets"[105]:

> The business strategy that works is to enter by way of high-margin markets and value-added markets: the urban carrier and business markets first targeted by local fiber companies, and the wireless and broadband markets targeted by wireless, cable, and other facilities-based providers of switches and alternative forms of transport. These have been the successful entry points; facilities-based competition for the rest of the market has spread out rapidly from there.[106]

As the principal CLEC trade association, ALTS, recently explained, to the extent any CLECs used to pursue unfocused entry strategies, they no longer do so.[107]

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104 *See, e.g., Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18042 (1998); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15756, 15792-95 (1997).

105 2002 Fact Report V-1.

106 2002 Fact Report V-3, V-4-6 (detailing the incremental growth strategy).

107 *See* ALTS 2000 Local Competition Report at 5 ("Over the past year, almost every CLEC has restructured its financing, reduced its debt load, and focused on serving those customers that contribute to a positive bottom line.").

Ubiquity. Perhaps the biggest canard in the CLECs' comments is the claim that requesting carriers are impaired even where alternatives to UNEs are available, unless such alternatives are present everywhere.[108] The UNE Remand Order itself rejected this contention in imposing geographic limits on the availability of unbundled switching, although, as Chairman Powell noted, that Order did not go far enough to implement the Court's instruction that the Commission consider alternatives outside the incumbents' networks.[109] The Chairman's criticism was confirmed by the *USTA* decision, which noted that the UNE Remand Order made UNEs available "in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have the object of Congress's concern."[110] Consequently, the Commission must take a more "granular" approach to the impairment inquiry, rather than sweeping away evidence of geographical differences as the CLECs urge.

In any event, apart from its legal infirmity, the CLECs' ubiquity argument is irreconcilable with marketplace realities in at least three respects.

First, as explained above, CLECs do not seek to compete instantly on a ubiquitous basis. Rather, they generally target the largest customers and largest markets first. Once they have established a base of operations and a revenue stream, they expand their presence incrementally. As Dr. Shelanski observes, "the mere fact that new entrants cannot feasibly construct ubiquitous networks does not make the case for unbundled access. Even if new entrants cannot offer full

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108 *See, e.g.*, WorldCom at 49 (claiming that no CLEC can build a ubiquitous, end-to-end network).

109 *UNE Remand Order*, Statement of Commissioner Powell, dissenting in part, at n.6 ("By using a broad national approach based on highly-disputed generalities, I still fear that the Commission has failed to pay adequate attention to the Court's instruction that we assess the availability of elements outside the incumbent's network, including self-provisioning.").

110 *USTA*, 290 F.3d at 422.

networks from the outset, they may be able to build out incrementally and to obtain interconnection with other carriers such that viable entry does not depend on unbundling."[111]

Second, CLECs can and do use their own or third-party facilities (sometimes in combination with an ILEC's tariffed services) to serve their business customers without having alternative facilities available to every last branch location of each of those customers. If that were not so, then no alternative facilities would exist – or, at least, not nearly so many as do exist – because CLECs would rarely be able to use them. That CLECs serve the significant majority of their business customers using their own facilities or other alternatives rather than UNEs further demonstrates the error of the ubiquity argument.

Third, the current lack of alternative facilities in some locations has no bearing on whether CLECs would be impaired without access to UNEs, even in those locations. To the contrary, the existence of alternative facilities in many locations raises a strong presumption that competition using non-ILEC facilities is possible everywhere. "[A]n absence of competitive facilities or continued use of UNEs may be the product of many factors that have nothing to do with the ability of CLECs economically to supply their own facilities," including regulation of end-user rates, predictions about changes in technology or the services that customers demand, and a strategy of focusing first on the highest-margin customers and services.[112]

The CLECs' ubiquity claim is nothing more than an effort to secure access to UNEs everywhere in perpetuity. Such an outcome, of course, is inconsistent with the Act and the *Iowa Utilities Board* and *USTA* decisions. It is also antithetical to Congress's core goal of promoting

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111 Declaration of Dr. Howard Shelanski, attached as Attachment C to Verizon, ¶ 13 (April 5, 2002) ("Shelanski Decl."). Consequently, "[t]he relevant question is not whether CLECs are entering local markets everywhere, but whether CLECs can enter without impairment the markets that they have demonstrated a realistic intent to enter." *Id.*, ¶ 4.

112 Shelanski Decl., ¶ 73.

facilities-based competition. Overbroad unbundling deters future investment and devalues past investment. The Commission must reject, once and for all, the notion that alternatives to UNEs must be ubiquitous in order to support a non-impairment finding.

B. Impairment cannot be demonstrated by assuming ILECs enjoy insurmountable economies or comparing the costs of alternative facilities to TELRIC-based UNE rates.

The CLECs base their impairment claims in large part on the ILECs' supposed economies of scale and scope. Their arguments take two main forms. First, the CLECs state that they cannot immediately replicate the ILECs' networks, but rather need UNEs in order to build up a customer base and eventually deploy their own facilities.[113] Second, they say that they cannot build their own facilities except in rare circumstances because the cost is so much greater than the cost of buying UNEs.[114] These arguments are inconsistent with the Act and with each other, they are irrelevant, and, for a number of reasons, they are wrong.

1. The CLECs' cost arguments impermissibly equate the costs of entry with impairment.

The CLECs' cost-based arguments are inconsistent with the Act because, at bottom, the CLECs portray the entire ILEC network as a natural monopoly – a contention that is inconsistent with the significant deployment of competitive facilities and Congress's own assessment of the market. In reality, the costs pointed to by the CLECs "are simply disparities faced by virtually any new entrant in any sector of the economy, no matter how competitive the sector."[115] CLECs are not impaired, however, by virtue of "cost disparities that are universal as between new

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113 *See, e.g.*, ALTS at 18-19; AT&T at 38-43, 61-64; CompTel at 13-14.

114 *See, e.g.*, AT&T at 125-31; WorldCom at 19-20.

115 *USTA*, 290 F.3d at 426 (citing with approval petitioners' position).

entrants and incumbents in *any* industry"[116]; as the *USTA* court explained, "average unit costs are necessarily higher at the outset for any new entrant into virtually any business."[117] Competitors can and do enter and compete successfully in other markets under these same circumstances, so these kinds of costs cannot be said to constitute "impairment."

2. The CLECs' cost arguments are internally inconsistent and fail to recognize that a gap between real entry costs and TELRIC rates does not amount to impairment.

The CLECs' cost arguments are internally inconsistent because they cannot simultaneously claim that: (1) UNEs are needed in order to justify the eventual deployment of their own facilities, and (2) facilities deployment is generally impossible given the cost differences between UNEs and non-ILEC alternatives. What this inconsistency shows, once again, is that current UNE pricing does not reflect economic realities. It is the CLECs, not the ILECs, that are best able to build new networks based on the most efficient possible technology. CLECs can (and do) build true green-field networks; ILECs, which have built their networks over decades using a wide mix of technologies, cannot. Consequently, if some CLECs find that they cannot deploy their own facilities as cheaply as they can purchase UNEs, the reason is not the ILECs' supposed economies of scale and scope.

The Commission cannot find impairment based on a comparison of the cost of alternative arrangements and the cost of UNEs. By their very nature, TELRIC-based rates almost always will render UNEs less expensive than building out alternative facilities. As the D.C. Circuit

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116 *Id.* at 427 (emphasis in original).

117 *Id*. For this reason, in considering the extent to which costs faced by CLECs impose obstacles to market entry, the Commission must restrict its examination to *competitive* impairment. There are many costs that all competitors in a market – ILECs and CLECs – must incur and recover. These include, for example, the costs of obtaining franchises and construction permits, building out fiber, and implementing and upgrading back-office operations. That CLECs face such costs must be irrelevant to the impairment analysis. Where ILECs and CLECs face the same hurdles, there is no basis for mandating unbundled access to an ILEC's network.

held, "the closer the Commission's pricing principle is to the low end of what it may lawfully set, the greater the probability that lack of access would cause 'material diminution.'"[118] If impairment were found whenever such a cost difference existed, there would be no limit on the unbundling obligation – a result that would contravene the *Iowa Utilities Board* decision.

3. The CLECs' purported inability to replicate the ILECs' existing networks does not amount to impairment.

In addition to being legally infirm, the CLECs' cost arguments are irrelevant because no new entrant strives to replicate the ILECs' *existing* networks, either in terms of technology or in terms of coverage and design. Existing ILEC networks are largely circuit-switched and copper-based, while new networks are packet-switched and fiber-based. The economics of building new networks are vastly different from those the ILECs face in deploying, maintaining, and upgrading their existing networks. Whatever economies of scale and scope ILECs might have enjoyed in building their current networks are irrelevant to creating the networks of the future. CLECs and ILECs are on at least an equal footing – indeed, as discussed below, CLECs in many respects have significant advantages – in constructing new networks.

Moreover, while CLECs bemoan the costs of building facilities to every home and business, no CLEC (except perhaps cable and wireless providers, which already have extensive networks) intends to undertake such construction immediately upon market entry. Rather, as we explained above in refuting the CLECs' ubiquity arguments, the CLECs pick and choose their markets and their customers, targeting the most lucrative opportunities and incrementally expanding their networks over time. The costs of doing so are obviously manageable, given the tremendous deployment of alternative switching, transport, and high-capacity loop facilities.

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[118] *USTA*, 290 F.3d at 424, n.2.

4. The CLECs ignore their own cost advantages, disregard the ILECs' serious disadvantages, and fail to consider potential revenues from services other than their local exchange offerings.

The CLECs ignore several factors that mitigate any cost disparity they may face. First, they disregard the serious diseconomies faced by the ILECs. As noted above, unlike the CLECs, ILECs must assure that any new technology deployed in their networks is compatible with legacy equipment, network architecture, and operating systems. For example, in upgrading their networks, ILECs cannot simply determine what technology and design would be optimal for a particular service area; they must work with what is already in place and often must upgrade one line at a time. Alternative vendors such as cable companies, in contrast, generally can upgrade an entire serving area simultaneously. ILECs also experience higher labor costs than CLECs, since few CLECs employ unionized workers. In many cases, labor can be the largest or second-largest cost component of a network upgrade (such as replacing copper with fiber). In addition, ILECs are saddled with substantial regulatory costs – stemming both from such substantive obligations as unbundling and collocation,[119] and from tariff filing, reporting, accounting and auditing, and other procedural requirements from which CLECs are largely exempt.

Second, the flip side of these ILEC diseconomies is that the CLECs enjoy real and often material cost advantages, which they just as scrupulously ignore in claiming that they cannot economically compete. CLECs can and do selectively serve only those customers that are most lucrative – as the D.C. Circuit noted, "the Commission nowhere appears to have considered the advantage CLECs enjoy in being free of any duty to provide underpriced service to rural and/or

[119] It is no answer to suggest that the ILECs are entitled to recover these costs from CLECs. For many of these obligations (line sharing and line splitting being prime examples), the ILECs incur millions of dollars of costs to prepare their networks and OSS to comply, but there is hardly any CLEC demand. And, even where there is demand for a UNE, the TELRIC pricing methodology often is manipulated to produce prices that do not recover all relevant costs.

residential customers and thus of any need to make up the difference elsewhere."[120] They can serve larger areas with their switches, for example, and they can and do use non-unionized labor. They can and do design and deploy the most efficient possible, forward-looking networks. And, they can and do avoid the vast majority of the regulatory expenses faced by the ILECs. For obvious reasons, no CLEC has ever attempted to quantify these cost savings or to demonstrate that they do not offset any supposed ILEC economies.

Third, the CLECs likewise disregard the various sources of revenue, beyond local exchange service, that they can tap into once they deploy their own facilities. Unlike the ILECs (which in most states remain prohibited from providing interLATA services), CLECs can immediately offer the full range of services to their customers – not just local exchange service, but also long distance voice, high-speed Internet access, and video distribution, for example. That is precisely the strategy pursued by successful overbuilders such as RCN. The Commission therefore must dismiss arguments that CLECs cannot deploy their own facilities because the *local exchange* revenues available from the vast majority of customers are insufficient to justify such investment. No CLEC competes solely for the local telephone service revenues of potential customers, and no ILEC would either, if it had a choice.

Fourth, setting aside the issue of what revenues they are considering, the CLECs complain that they cannot make a profit from serving the vast majority of customers using their own facilities. The Commission must recognize, however, that no start-up operation can be expected to earn a profit from day one. Telecommunications is a capital-intensive industry, and any new entrant must expect that it will take several years to recover the costs associated with deploying a network and building back-office systems. Once those costs are recovered, there is

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120 *USTA*, 290 F.3d at 423.

every reason to think that CLECs, using efficient technology, building out from a base of lucrative customers, and providing attractive packages of services, can earn handsome returns. Consequently, an initial period of losses attributable to the costs associated with establishing and operating a new telecommunications business cannot be equated with impairment.

V. UNBUNDLING OBLIGATIONS CANNOT BE MAINTAINED IN THE ABSENCE OF IMPAIRMENT.

A. Congress did not intend that UNEs would continue to be available in perpetuity, even after the market is characterized by facilities-based competition.

Certain CLECs contend that facilities-based competition was not the goal of the Act and that UNEs, resale, and facilities-based entry should be available in all geographic areas in a fully competitive market.[121] The Commission need look no further than the preamble to the 1996 Act for confirmation that the CLECs are wrong: Congress sought to establish "a pro-competitive and *deregulatory* national policy framework designed to accelerate rapidly *private sector deployment* of advanced telecommunications services and technologies to all Americans."[122] To make matters even clearer, Congress ordered the Commission to "remove barriers to infrastructure investment."[123] Congress understood, as does the Commission, that "only by encouraging competitive LECs to build their own facilities or migrate toward facilities-based entry will real and long-lasting competition take root in the local market."[124] As the D.C. Circuit has explained,

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121 *See* CompTel at 12; UNE-Platform Coalition at 38-39; *see also* AT&T at 38 (arguing that the Commission cannot consider the effects of unbundling on competition).

122 H.R. Rep. No. 104-458, 104th Cong., 2nd Sess. 1 (1996) (emphasis added).

123 Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S.C. § 157.

124 *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Fourth Report and Order, CC Docket No. 98-147, FCC 01-204, ¶ 4 (rel. Aug. 8, 2001) (*"Collocation Remand Order")*.

Congress did not wish to perpetuate the "completely synthetic competition" resulting from overbroad reliance on UNEs; it sought to promote facilities-based competition.[125]

In the statutory scheme, unbundling is only a transitional mechanism – not, as some CLECs would have it, a permanent and ubiquitous entry option. Congress intended that UNEs would be available only "until it was practical and economically feasible [for CLECs] to construct their own networks."[126] For this reason, Congress permitted the Commission to mandate unbundling only in the limited circumstances where the Commission finds, at a minimum, that competitors would be impaired. Moreover, even if the Commission finds impairment, it still cannot mandate unbundling where the availability of UNEs would impede achievement of the Act's core goals – most importantly, facilities-based competition. Consequently, to avoid eviscerating the impairment standard, the availability of UNEs as an alternative mode of entry must be extinguished where competitors no longer would be impaired if they used their own facilities, third-party sources of an element, or substitutes within the ILEC's network.[127]

Maintaining UNEs after facilities-based competition is feasible would not only violate Congress's express mandate to the Commission, but also would undermine achievement of the

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125 *USTA*, 290 F.3d at 424. As we have explained above, the Supreme Court's *Verizon* decision is not to the contrary. That case held only that TELRIC was a permissible exercise of the Commission's pricing discretion and, in fact, confirmed that UNE pricing should apply only to bottleneck elements that already have passed the impair test. In addition, the *Verizon* decision discusses the use of UNEs only in conjunction with CLEC-provided facilities. *See Verizon*, 122 S.Ct. at 1672, n.27 ("entrants may need to share some facilities that are very expensive to duplicate (say, loop elements) in order to be able to compete in other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology). … [T]he Act allows for an entrant that may have to lease some 'unnecessarily expensive' elements in conjunction with building its own elements to provide a telecommunications service to customers.").

126 *UNE Remand Order*, 3701.

127 As Dr. Shelanski points out, retaining unbundling obligations after facilities-based entry is occurring "eliminates any economic meaning from 'impairment' and would lead to distortions of competitive incentives." Shelanski Reply Decl., ¶ 2.

Act's most critical objectives by supplanting rather than merely supplementing facilities-based competition:

> One might argue that unbundling will simply coexist with, and not supplant, facilities-based competition where the latter is feasible. From that standpoint unbundling is simply another available entry path that should be left open to entrants. This argument is flawed for several reasons. To begin with, even if unbundling were to substitute only marginally for facilities-based entry, the foregone consumer gains could be substantial. But when unbundling is available, its substitution effect is likely to be more than merely marginal.[128]

Indeed, "rather than continuing and extending widespread availability and the use of UNEs, the pro-competitive policy would be to reduce and eventually eliminate mandatory sharing obligations when and where facilities-based competition has demonstrated that they are no longer essential."[129]

Preserving unbundling in the absence of impairment also would fail to recognize that, as competitors enter on a facilities basis, subsequent entrants will find it more difficult to gain a foothold in the market. With every new competitor chasing the same customers, entry becomes less attractive. To argue that UNEs are necessary to allow continued entry even after facilities-based competition has emerged is tantamount to seeking help from the Commission to overcome "impairment" that arises solely from the increasingly competitive nature of the market – not from the ILECs' incumbency. Doing so would punish earlier entrants into the market, ignore the

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[128] Shelanski Decl., ¶ 20. Dr. Shelanski explains that a UNE-based entry strategy "would free the entrant from having to engage in independent innovation efforts and, moreover, afford it an option on any advance in the network implemented by the incumbent. … Consumers bear the resulting costs in the form of reduced flow of cost-reducing advances in the network and reduced flow of new service options." *Id*. at ¶ 21.

[129] Kahn/Tardiff Reply Decl., ¶ 20; *see also* Shelanski Reply Decl., ¶ 10 ("If firms have found it economically rational to enter a market with their own facilities, unbundling will only foster more entry if regulators make it inefficiently cheaper than – and harmful to – the facilities-based entry that other firms have already shown to be efficient.").

reality that high fixed-cost/low marginal-cost industries can absorb only a limited number of firms, and mistake the lack of an attractive business case for genuine impairment.[130]

Importantly, CLECs are correct in noting that competitive markets support various modes of entry; their fatal flaw is in suggesting that the Act compels or even permits the perpetuation of UNE-based entry where Section 251(d)(2) is not met. In a competitive market, all facilities-based providers will have an incentive to maximize use of their networks and therefore to negotiate commercially reasonable access arrangements.[131] "[T]he more competitive the market is, the more sufficient are the incentives of facilities-based providers to negotiate such arrangements …. [W]here … a market is competitive, market forces are sufficient to encourage participants to reach agreements that will maximize consumer welfare."[132]

Forced unbundling, therefore, is not just harmful where facilities-based entry is possible, but it is unnecessary as a means of enabling entrants that wish to compete without using their own facilities to do so. They can, but on terms that are economically rational and determined by the marketplace rather than by regulatory fiat.

B. The "at a minimum" proviso can only limit, not expand, the availability of UNEs.

In the UNE Remand Order, the Commission properly held that the Act's "at a minimum" proviso authorizes it to consider the effects of unbundling on the Act's core goals and, where unbundling would disserve those goals, to decline to order access to a UNE even if requesting

130 Shelanski Reply Decl., ¶ 9.

131 Verizon at 49-50.

132 Declaration of Drs. Alfred Kahn and Timothy Tardiff, ¶ 36 attached as Attachment D to Verizon (Dec. 18, 2001) ("Kahn/Tardiff Decl."), ¶ 36.

carriers might be impaired.[133] Thus, the Commission did not (with limited exceptions) require unbundled access to packet switching, even though it found that requesting carriers "may be impaired in their ability to offer" mass market advanced services without this element. As the Commission explained, the "nascent nature of the advanced services marketplace" and "our concern that we not stifle burgeoning competition … in such a dynamic and evolving market" counseled against mandatory unbundling.[134]

Several CLECs now try to turn the "at a minimum" proviso on its head. They argue that this language permits the Commission to order unbundling in the absence of impairment, but not to limit unbundling where impairment exists but any competitive benefit is outweighed by harm to Congress's key goals.[135] Their arguments have no basis in the statute.

Permitting the "at a minimum" language to trump a finding of non-impairment cannot be reconciled with the Supreme Court's holding that the statute imposes "clear limits" on the Commission's ability to mandate unbundling.[136] In fact, the Commission pressed the same argument before the Court, claiming that it need only *consider*, rather than give dispositive weight to, the necessary and impair standards. The Court's decision lays to rest any possibility that the Commission was correct then and that the CLECs are correct now. Such a reading would impose no limits on the Commission's ability to unbundle, writing Section 251(c)(2) out

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133 The Commission also improperly suggested that the "at a minimum" proviso enables it to require unbundling even in the absence of impairment. *UNE Remand Order*, 3746-47. That position is wrong, as explained in this section.

134 *UNE Remand Order*, 3835, 3840.

135 *See* ALTS at 35-36; WorldCom at 52; Z-Tel at 17.

136 *Iowa Util. Bd.*, 525 U.S. at 397.

of the Act and reinstating the unbounded unbundling regime that the Court struck down.[137] Indeed, the D.C. Circuit, while assuming for the sake of argument that the Commission had the authority to consider factors beyond the necessary and impair standard, seriously questioned the proposition that the Commission could order unbundling in the absence of impairment: "to the extent that the Commission orders access to UNEs in circumstances where there is little or no reason to think that its absence will genuinely impair competition that might otherwise occur, we believe it must point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible."[138]

On the other hand, interpreting the "at a minimum" language to authorize additional limits on unbundling notwithstanding potential impairment is likewise necessary to apply the statute consistently with the Court's opinion and Congress's intent. As the Court explained, Section 251(d)(2) must be read to apply "*some* limiting standard, rationally related to goals of the Act."[139] Consequently, the Commission not only may, but must, decline to order unbundling where the damage to facilities-based competition or deployment of advanced technologies outweighs the potential harm to non-facilities-based entrants.

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137 In addition, permitting the "at a minimum" proviso to authorize unbundling in the absence of impairment would contravene fundamental canons of construction requiring statutes that work a taking to be narrowly construed. There can be no question that forced sharing of the network is a taking. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, et al.*, 11 FCC Rcd 15499, 15635 (1996) ("*Local Competition Order*") (the purchaser of a UNE "is entitled to exclusive use of that facility for a period of time"); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08 (a taking has occurred when a utility is compelled to dedicate its property to public use). As the D.C. Circuit held in vacating the Commission's collocation order, the Commission must avoid "unnecessary takings of LEC property" in interpreting the Act. *GTE Service Corp. v. FCC*, 205 F.3d 416, 426 (D.C. Cir. 2000) ("*GTE*").

138 *USTA*, 290 F.3d at 425.

139 *Iowa Util. Bd.*, 525 U.S. at 388, 391-92.

Against this background, CompTel is mistaken in characterizing the use of the "at a minimum" proviso to limit unbundling as unlawful forbearance.[140] Forbearance refers to non-enforcement of a statutory requirement. The "at a minimum" language, however, goes to whether an element should be unbundled in the first instance. In CompTel's view, impairment is a sufficient but not necessary condition for unbundling; in reality, impairment is necessary but not sufficient. The Commission may decline to order unbundling where impairment exists, but it may not order unbundling where impairment is absent.

C. States cannot expand the list of UNEs adopted by the Commission or prevent removal of UNEs from the national list.

The CLECs and state PUCs argue that state regulators should play a central role in determining what UNEs should be made available. While the nature of that role varies – some contend that states can add UNEs but not remove them,[141] others claim that states can both add and remove UNEs,[142] and others maintain that states can add UNEs but that both the FCC and affected PUCs must agree before a UNE may be removed[143] – these parties assert that state authority with respect to UNEs stems from Sections 251(d)(3), 261(b), and 261(c) of the Act. They are incorrect: under Section 251(d)(2), the FCC, and the FCC alone, has authority to identify which UNEs must be provided. Any state regulation expanding the UNE list would conflict with federal law, frustrate the purposes of the Act, and therefore be preempted.

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140 CompTel at 28-29.

141 ALTS at 131-32; CompTel at 107; Covad at 88.

142 ASCENT at 46-48; FPSC at 5-6; GPSC at 4; Massachusetts DTE at 1-4; NYDPS at 8.

143 AT&T at 241-51; Z-Tel at 90-91. Relatedly, some parties support establishment of a federal-state joint board to address UNE issues. *See, e.g.*, NARUC at 4; Oklahoma Corp. Comm. at 5.

Making this point clear is of critical importance. As detailed above, unbundling is a drag on investment and impedes facilities-based competition. The scope of unbundling must therefore be narrowly limited in order to realize Congress's vision for the 1996 Act. Establishing a suitably tailored list of UNEs at the federal level, only to have the states treat that list as a minimum subject to potentially unlimited expansion, would be just as harmful to competition and consumers, and just as inconsistent with Congress's goals and the Supreme Court's and D.C. Circuit's mandates, as if the Commission had never narrowed the list in the first place. A nominal federal limit that the states can ignore is no limit at all.

Moreover, the Commission properly has emphasized that its "policy and regulatory framework" should "foster investment and innovation … by limiting regulatory uncertainty and unnecessary or unduly burdensome regulatory costs."[144] CLECs likewise have stressed the need for regulatory certainty in order to provide a stable investment environment.[145] Nothing could be more unstable, and more destructive of investment incentives – for both ILECs and CLECs – than leaving it to 51 separate PUCs (plus those in affected U.S. territories) to decide which UNEs have to be offered and under what conditions. Undeniably, ILECs will be discouraged from making substantial investments in new technologies or facilities, even if the Commission has

144 *Appropriate framework for Broadband Access to the Internet Over Wireline Facilities; Universal Services Obligation of Broadband Providers; Computer III Further Remand Proceedings,* Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3022 (2002) ("*Broadband NPRM*").

145 *See*, *e.g.* Sprint at 58 (state-by-state rulemakings, inquiries, and litigation on UNEs could have a chilling effect on investment); CompTel at 84-85 (uncertainty undermines investor confidence); CLEC Coalition at 109 (FCC must bring certainty and stability to the competitive marketplace).

found that they should not be unbundled, if faced with the prospect of dozens of state-by-state proceedings in which CLECs sought to reverse the Commission's determination.[146]

Congress left no room for such a fiasco. Section 251(d)(2) could not be more clear: "[i]n determining what network elements should be made available ... *the Commission shall*" conduct the requisite analysis.[147] The states can neither reverse-preempt a Commission determination that the statutory unbundling standard is not met, nor delay de-listing of an element until they grant their consent.[148] Where Congress intended to give the states a role in implementing Sections 251 and 252, it did so explicitly.[149] Section 251(d)(2) does not allow the states to supplement, or to veto deletions from, the UNE list.

None of the general reservations of state authority overrides Section 251(d)(2) and creates such a role. Far from leaving an opening for the states, Section 251(d)(3) confirms that it is the Commission that must determine which elements should be unbundled. Under this subsection, any state access and interconnection regulations must be "consistent with the

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146 As the Supreme Court has noted, "a federal program administered by 50 independent state agencies is surpassing strange." *Iowa Util. Bd.*, 525 U.S. at 377 n.6.

147 47 U.S.C. § 251(d)(2) (emphasis added). Accordingly, as the Supreme Court has recognized, "the question … is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has." *Iowa Util. Bd.*, 525 U.S. at 377 n.6.

148 *Cf. New York v. FCC*, 267 F.3d 91 (2nd Cir. 2001). In that case, the Second Circuit denied a challenge by the New York Public Service Commission to an FCC order rejecting an NYPSC area code overlay decision that was inconsistent with the FCC's rules implementing Section 251(e). That provision states that "*[t]he Commission shall* create or designate one or more impartial entities to administer telecommunications numbering and to make[] numbers available on an equitable basis." *Id.* at 96 (Emphasis added.) As the Second Circuit noted, Congress expressly gave the Commission authority to promulgate the challenged regulations, and therefore the Commission's action was proper. The same formulation – "the Commission shall" – is present in Section 251(d)(2).

149 *See* 47 U.S.C. § 251(f) (states determine whether to terminate an ILEC's rural exemption); 47 U.S.C. § 252(b) (states arbitrate interconnection agreements); 47 U.S.C. § 252(d) (states determine rates for interconnection and UNEs).

requirements of" Section 251 and must not "substantially prevent implementation of [Section 251] and the purposes of this part."[150] If the Commission has determined that a particular UNE does not meet the standard for unbundling, any contrary finding by a state would be inconsistent with the Commission's determination, the statute, frustrate achievement of the statutory objectives, and consequently be preempted.[151]

For the same reasons, Sections 261(b) and (c) grant no authority to the states either to adopt additional unbundling requirements or to prevent removal of a UNE from the national list. Section 261(b) prohibits the states from prescribing regulations "in fulfilling the requirements of this part" unless such regulations are "not inconsistent with the provisions of this part."[152] Likewise, Section 261(c) precludes a state from "imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange access," except where those requirements "are not inconsistent with this part or the Commission's regulations to implement this part."[153] By their terms, these provisions do not brook any state role in establishing additional unbundling obligations or in retaining obligations that the Commission has found should be eliminated.

The Commission thus should rule that it alone may add and delete UNEs. In addition, the Commission should expeditiously halt existing state efforts to craft expanded unbundling

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150 47 U.S.C. § 251(d)(3)(C).

151 Conflict preemption is implicated when it is impossible for a party to comply with both federal and state laws, *see Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), or when the state law frustrates, *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978); or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 540-41 (1977); *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941). State UNE requirements that differ from federal requirements fall squarely within this precedent.

152 47 U.S.C. § 261(b).

153 *Id.* § 261(c).

requirements. The multitude of pending state proceedings where such matters are being addressed,[154] and the fact that several states already have taken it upon themselves to create new UNEs,[155] and override the FCC's switching exemption,[156] compel the Commission to act as quickly as possible – preferably in advance of issuing a comprehensive order in this proceeding – to re-assert its exclusive jurisdiction in this area.

D. Section 271 does not impose an independent obligation to unbundle loops, switching, transport, and signaling.

In our opening comments, we explained that the most reasonable reading of items four through six (loops, transport, and switching) and ten (signaling) of the Section 271 checklist is that these items are satisfied once the corresponding facility no longer meets the Section 251(d)(2) standard. Where there is no impairment with respect to these elements, the market

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[154] For example, the Kansas Corporation Commission is considering whether new UNEs should be designated for the provisioning of DSL services. *See General Investigation to Determine Conditions, Terms and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditions, and Line Sharing*, KCC Docket No. 01-GIMT-032-GIT. Similarly, the Georgia Public Service Commission and the Tennessee Regulatory Authority have pending proceedings to determine the extent to which local switching must be unbundled. *See Generic Proceeding to Review Cost Studies, Methodologies, Pricing Policies and Cost Based Rates for Interconnection and Unbundling of BellSouth Telecommunications, Inc.'s Network*, GPSC Docket No. 14361-U; *Petition of Tennessee UNE-P Coalition to Open Contested Case Proceeding to Declare Unbundled Switching on Unrestricted Unbundled Network Element*, Tennessee Regulatory Authority, Docket No. 02-00207. Further, the Texas PUC has an open proceeding to determine the unbundling obligations for local switching, dedicated transport, and OS/DA. *See Petition of MCImetro Access Transmission Services LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephony Company Under the Telecommunications Act of 1996*, Texas PUC Docket No. 24542.

[155] For example, the Hawaii PUC recently mandated that OS/DA be provided on an unbundled basis. *See Public Utilities Commission Instituting a Proceeding on Communications, Including an Investigation of the Communications Infrastructure of the State of Hawaii*, Hawaii PUC Docket No. 7702; Decision and Order No. 19018, at 20-21 (Nov.15, 2001). The Texas PUC has required that a "stand alone" splitter be provided as a feature and functionality of the local loop. *Petition of Southwestern Bell Telephony Company for Arbitration with AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications, Inc. Pursuant to Section 252(b)(1) of the Federal Telecommunications Act of 1996*, Texas PUC Docket No. 11215 at 9 (Mar. 14, 2001).

[156] By way of illustration, the Pennsylvania PUC has ordered that unbundled local switching be available to serve small businesses until December 31, 2003. *See* Pennsylvania PUC Docket Nos. P-00991648 and P-009916349, *Opinion and Order* (Aug. 26, 1999).

must be considered open – which is, after all, the fundamental purpose of the checklist. Moreover, perpetuating the availability of these facilities after they no longer meet the impairment test would undermine Congress's core goal of promoting facilities-based competition and set Sections 251(d)(2) and 271 in conflict with one another. In the alternative, we formally petitioned the Commission to forbear from applying these checklist items once the related facilities need not be unbundled under Section 251(d)(2).[157]

Certain CLECs, in contrast, claim that the unbundling obligation under Section 271 is independent of Section 251(d)(2), so that the RBOCs (alone among ILECs) must continue to unbundle loops, switching, transport and signaling even after those elements no longer meet the impairment standard.[158] At least one CLEC (Z-Tel) goes even farther, arguing that the Commission is wrong in permitting checklist items that no longer meet the unbundling standard to be priced at non-TELRIC rates.[159] Their arguments are baseless.

The checklist items cannot properly be read as establishing unbundling obligations independent of Section 251(d)(2). As explained above, Congress intended that UNEs be available only as a transitional mechanism in order to assure that unbundling does not undermine achievement of the core statutory goal of facilities-based competition. To that end, Congress incorporated limits into Section 251(d)(2), in the form of the necessary, impair, and at a

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157 Verizon at 66-69.

158 *See* CompTel at 20; ALTS at 117-18; CLEC Coalition at 115-16; Z-Tel at 4-15; UNE-Platform Coalition at 17.

159 Z-Tel at 10-13 (arguing that rates for the checklist items must be based on the 251(d)(1) pricing standard and that the Commission lacks authority to issue pricing rules for "predominantly local facilities" under Section 201). Z-Tel goes on to argue that, even if adherence to Section 251(d) pricing of loops, switching, and transport meets the general test for forbearance, the BOCs must demonstrate through a petition for forbearance that these requirements have been fully implemented. Z-Tel at 18-20. Verizon has done so, as noted above. *See* Verizon at 68-69.

minimum constraints on the Commission's ability to mandate access to UNEs. It is nonsensical to suggest that Congress would have crafted a limited regime in the provision that establishes the unbundling obligation, only to exclude carriers serving (when the Act was passed) more than 80 percent of the nation's access lines from those limits in another section of the Act. The only way to reconcile these provisions is to recognize that, once an element no longer meets the statutory standard for mandatory unbundling, the corresponding checklist item is satisfied. If requesting carriers are not impaired without access to an element, then the lack of access is not a barrier to entry, and the market must be considered open for purposes of Section 271.

Z-Tel's arguments to the contrary are unpersuasive. First, it asserts that the legislative history (the Senate Report on a predecessor bill to the 1996 Act) establishes that the checklist is "to set forth what must, at a minimum, be provided … in any interconnection agreement … before the FCC may authorize the [BOC] … to provide in region interLATA services."[160] There are several problems with this claim. Most notably, the Conference Report on the 1996 Act contains no such statement.[161] More fundamentally, at most, the legislative history cited by Z-Tel suggests that *applications* for Section 271 authority must demonstrate compliance with element-related checklist items. After a BOC has received interLATA authority for a state, then even under Z-Tel's argument, the Commission is free to hold that continued compliance with those checklist items is unnecessary because they are satisfied once CLECs no longer are impaired. And, at that point, there can be no question that the Commission can forbear under Section 10 because the Section 271 requirement has been "fully implemented."

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160 Z-Tel at 9-10, *citing* S. Rep. 104-23, 104th Cong., 1st Sess. 43 (1995).

161 *See* Joint Explanatory Statement of the Committee of Conference 34 (stating only that "[n]ew section 271(c)(2) sets out the specific interconnection requirements that comprise the 'checklist' that a BOC must satisfy as part of its entry test.").

Second, Z-Tel claims that Section 271(d)(4), which states that the Commission "may not … limit [or extend] the terms used in the competitive checklist," prohibits the Commission "from relieving the BOCs of the duty of providing unbundled access to loops, transport, and switching at cost-based rates, except pursuant to the forbearance provision."[162] This is wrong because a finding that a checklist item is satisfied once the relevant element no longer meets the Section 251(d)(2) standard is not a limitation of the terms used in the checklist. Such a finding does not excuse a BOC from complying with the relevant checklist item; rather, it means that the BOC is deemed to have complied with the item. In addition, even if such a finding could properly be construed as a limitation, Section 271(d)(4) is intended to cover the Commission's evaluation of applications for interLATA authority, not to impose a constraint that carries forward post-approval.[163] Once again, therefore, even under Z-Tel's argument, the Commission can declare, with respect to Section 271-approved states, that the relevant checklist item is met where no impairment exists for the network element at issue. And, in any event, forbearance plainly is warranted in such circumstances, as we have previously demonstrated.[164]

Apart from all this, the CLECs still are wrong in asserting that elements that no longer meet the Section 251 standard must be priced at TELRIC. The only checklist item that

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162 Z-Tel at 8, *citing* 47 U.S.C. § 271(d)(4).

163 Section 271(d)(1) provides for the filing of an application. Section 271(d)(2) provides for consultation with the Department of Justice and state regulators as part of the review process. Section 271(d)(3) sets forth the criteria for approving or denying an application. Section 271(d)(4) states that the Commission cannot limit or extend the terms of the checklist. Section 271(d)(5) requires the Commission to publish its decision in the Federal Register. Then, Section 271(d)(6) provides for post-entry enforcement. Clearly, the first five subsections of Section 271(d) deal only with the evaluation of applications. While Section 271(d)(6) deals with the Commission's authority if a BOC "has ceased to meet any of the conditions required" for approval, there is no limit on the Commission's ability to declare that the BOC complies with the requisite conditions as long as a network element need not be unbundled.

164 *See* Verizon at 66-69.

incorporates the Section 252(d) pricing standard is item two, which requires a BOC to provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." The checklist items dealing with specific network elements are silent as to pricing. Accordingly, where a UNE need not be provided under Section 251(c)(3) (which is governed by the limits in Section 251(d)(2)), it need not be priced in accordance with TELRIC.

Z-Tel errs in claiming that the Commission has no authority under Section 201(b) to establish rates for these elements because they are predominantly intrastate.[165] The Supreme Court has held that "Section 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."[166] Section 271 falls within that grant of authority. Moreover, the Supreme Court rejected claims that, when dealing with matters covered by the 1996 Act, the Commission's rulemaking authority under Section 201(b) is limited by the reference to "interstate or foreign communication service" in Section 201(a): "It is impossible to understand how this use of the qualifier 'interstate or foreign' in § 201(a), which limits the class of common carriers with the duty of providing communication service, reaches forward into the last sentence of § 201(b) to limit the class of provisions that the Commission has authority to implement."[167] Consequently, in the absence of impairment, if the facilities specifically referenced in the checklist need to be unbundled at all – which they do not – then the Commission: (1) is correct in stating that they are not subject to TELRIC pricing, and (2) should

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165 Z-Tel at 12.

166 *Iowa Util. Bd.*, 525 U.S. at 380 (emphasis in original).

167 *Id.* at 378.

hold that these elements, which are provided in a competitive market, may be provided at market-driven rates.

Finally, if the Commission requires unbundling for Section 271 purposes of elements that are not subject to unbundling under Section 251, it cannot mandate that those elements be combined. Checklist items four through six apply to loops "unbundled from local switching or other services," local transport "unbundled from switching or other services," and local switching "unbundled from transport, local loop transmission, or other services," respectively.[168]

Moreover, CLECs cannot rely on the Supreme Court decision requiring that already combined elements be offered as a combined UNE. That decision assumed that such elements would be offered only where competing carriers were impaired. Indeed, that same decision admonished the Commission that Section 251(d)(2) requires a limiting standard.[169] Similarly, the more recent *Verizon* decision also assumes that the requirement for new combinations of UNEs would be applied to UNEs offered under Section 251. The justification for the requirement is in fact premised on "the understanding that incumbent monopolists and contending competitors are unequal,"[170] an assumption that does not apply if the requirements for Section 251 unbundling have not been met. The Commission therefore cannot use Section 271 to preserve the UNE-P once any component of the platform no longer satisfies the impairment standard.

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168 *See* 47 U.S.C. §§ 271(c)(2)(B)(iv)-(vi).

169 *Iowa Util. Bd.*, 525 U.S. at 388.

170 *Verizon*, 122 S.Ct. at 1684.

E. The Commission should establish a sunset date, decline to grandfather existing UNEs or customers, and limit any transition to the time reasonably necessary to convert existing customers to alternative serving arrangements.

1. A sunset date is imperative in order to create appropriate investment incentives.

Because "each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities,"[171] it is imperative that the Commission set a firm sunset date – no longer than three years from the effective date of an order in this proceeding – for eliminating the remaining UNEs. A cut-off date will ensure that CLECs invest where it is economically justifiable to do so, rather than holding off on the assumption that the Commission will continue to require access to UNEs in perpetuity. A sunset also will minimize obstacles to investment by ILECs, which otherwise would be reluctant to invest in new facilities if faced with potentially indefinite sharing obligations.

Not surprisingly, the CLECs oppose a sunset, arguing that any date certain for discontinuing unbundling would be arbitrary and would undercut the ILECs' incentive to comply with remaining unbundling obligations.[172] They are wrong on both counts.

A sunset would not be arbitrary. Given the substantial existing deployment of CLEC facilities and the rapid growth of inter-modal competition, any residual impairment almost certainly will be eliminated within three years after release of an order in this proceeding (presumably, roughly four years from the time the NPRM was issued and ten years after the Act was passed). Today, cable companies offer telephone service to more than 10 percent of the population (and offer it almost ubiquitously in several states), and they are expected to increase

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171 *USTA*, 290 F.3d at 427.

172 ALTS at 38-39; Eschelon at 18; CompTel at 83.

that number several-fold by 2005. Moreover, wireless service is expected to displace 10 million wireline lines within the next three years,[173] and wireline overbuilding by CLECs is bound to continue in many locations. The only reason to believe that impairment might persist is that the continuation of overbroad unbundling rules would discourage additional investment. For this reason, the Commission must eliminate unbundling obligations promptly upon a determination that requesting carriers would not be impaired; holding out longer than necessary would "deter innovation and displace superior improvements in market performance."[174]

Nor would a sunset motivate ILECs to disregard their unbundling obligations. ILECs have faithfully complied with those obligations to date, as is evident by the growing number of successful Section 271 applications. Moreover, the ILECs have every motivation to continue to comply with such obligations given: (1) the need to obtain interLATA authority in additional states, (2) the Commission's Section 271(d)(6) enforcement authority, and (3) the prospect of fines and forfeitures under the Act, state performance assurance plans, and individual interconnection agreements. Finally, non-compliance almost certainly would convince the Commission to reconsider a sunset and thus would be counter-productive.

2. The Commission cannot and should not grandfather existing uses and users of UNEs.

Certain CLECs ask the Commission to grandfather existing "uses and users" of any UNEs that are removed from the list[175] or to prohibit ILECs from discontinuing UNEs that are

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173 2002 Fact Report IV-12 (citing a December 2001 IDC report).

174 Shelanski Decl., ¶ 5. Accordingly, the Commission must reject requests either not to remove any UNEs for another five years or not to conduct another review of the UNE list for five years. In contrast to a sunset, which is plainly rational in light of the marketplace evidence, freezing the list of UNEs and turning a blind eye to changes in the market until late in this decade would be unquestionably arbitrary. New South at 7; WorldCom at 64.

175 CompTel at 75.

already in place or refusing to fill orders completed prior to release of the order in this proceeding.[176] There is no statutory basis for such requirements. Under Section 251(d)(2), UNEs are to be made available only so long as requesting carriers would be impaired without them (and, even then, only assuming that unbundling would be consistent with the core goals of the Act). The Commission has no authority to mandate unbundling beyond that point, and perpetuating the availability of UNEs would distort competition and punish CLECs that have invested in their own facilities.

CLECs cannot claim any reliance interest in existing UNEs. As they are well aware, the statute sets forth limits on the availability of UNEs, the UNE Remand Order makes clear that the list of UNEs would be re-examined in 2002, and marketplace developments confirm that competition without the use of UNEs is feasible as a general rule. Moreover, the lack of impairment underlying a decision to de-list a UNE itself mitigates any reliance interest that CLECs conceivably might have. Given the option of self-supplying, obtaining facilities from a third party, or using an ILEC's tariffed services, a CLECs readily can make alternative arrangements.

3. Any transition period following de-listing should last no longer than six months.

Somewhat more modestly, various CLECs ask the Commission to establish a transition period during which CLECs could continue to use de-listed UNEs.[177] Upon the effective date of

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[176] CLEC Coalition at 114. The CLEC Coalition goes even further, claiming that the removal of UNEs should take effect only upon state PUC approval of a tariff to make de-listed elements available on just, reasonable, and nondiscriminatory terms. *Id.* at 115. There is no legal basis for such a requirement; as discussed above, the FCC has sole authority to specify or de-list UNEs. Moreover, any such process would throw the market into a state of chaos, as CLECs sought to replicate in every state the rates, terms, and conditions that applied prior to de-listing.

[177] ASCENT at 48-51 (two-year transition); CompTel at 108.

an order de-listing a UNE, that UNE should no longer be available to serve new customers or new locations of existing customers. Any extension beyond that time could not be reconciled with the statutory framework, under which access to UNEs cannot be mandated in the absence of impairment.

There is no basis for a transition of up to two years, as some CLECs suggest. Six months (or an interval to be negotiated by the parties) should be more than sufficient time to migrate existing, UNE-served customers to alternative arrangements. If particular customers have not been migrated at the end of the six-month (or negotiated) period because of the ILEC's inability to perform its part of the conversion process, then the current UNEs could be maintained (at TELRIC rates) until the ILEC completes the migration process or can facilitate transfer of the customer, whichever comes first. Of course, if the conversion of particular customers is completed in less than six months, then UNE pricing would be discontinued as soon as those customers are transitioned to alternative serving arrangements. Finally, in no event will CLECs be precluded from using our facilities after UNEs are discontinued; they can always provide service via resale or use of special access or similar arrangements, but not at TELRIC-based rates.

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Having set forth the appropriate analytical framework for the impairment analysis, we now turn to the specific UNEs at issue. We discuss these UNEs in the context of three service categories: broadband services (mass market and large business), traditional dedicated switched services (for carriers and end users), and traditional switched services (for business and mass market customers). These service categories reflect meaningful differences in service

functionality and/or type of customer, and each category logically encompasses a discrete set of UNEs.

VI. BROADBAND SERVICES

There is no rational basis upon which the Commission could find impairment with respect to either mass market or large business broadband services. Both broadband sub-markets are vibrantly competitive, and the ILECs collectively hold a minority market share. As Drs. Kahn and Tardiff conclude, "the very idea of maintaining and expanding unbundling obligations at TELRIC rates for ILEC services, when these not only face stiff competition but have only one-half the market share of their major, unregulated rivals, who are subject to no such obligations cannot possibly be compatible with the spirit of the Telecommunications Act."[178]

A. Mass market broadband services are subject to significant inter-modal competition and ILECs are insurgents rather than incumbents.

As the Commission recently emphasized, there is a need "to minimize both regulation of broadband services and regulatory uncertainty in order to promote investment and innovation in a competitive market."[179] Likewise, "[b]y promoting development and deployment of multiple platforms, we will best ensure that public demands and needs for broadband services can be met."[180] The *USTA* decision confirms the wisdom of such a deregulatory, pro-investment approach; as the court noted with respect to line-sharing, "nothing in the Act appears a license … to inflict on the economy the sort of costs noted by Justice Breyer under conditions where it [has] no reason to think doing so would bring on a significant enhancement of competition."[181]

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178 Kahn/Tardiff Reply Decl., ¶ 41.

179 Internet over Cable Declaratory Ruling, ¶ 73.

180 *Id.*

181 *USTA*, 290 F.3d at 429.

1. The existence of substantial inter-modal competition precludes an impairment finding.

Against this background, the substantial inter-modal competition in the broadband mass market demonstrates that CLECs are not impaired without access to broadband UNEs, and that unbundling of these UNEs undermines facilities investment by all market participants.[182] The CLECs nonetheless argue that the ILECs' telephone networks are the only avenue for providing mass market broadband services. They state that the future of competition for all local exchange services, both narrowband and broadband, depends on continued line sharing, broader access to packet switching, sharing of all new fiber deployments, and creation of a new "unified loop" UNE that includes all copper, fiber, and electronics between the end user and the central office switch.[183]

The CLECs miss the big picture.[184] Unbundling of broadband UNEs cannot be required because the broadband market already is competitive, and unbundling obligations diminish

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[182] Verizon at 73-76, 83-84; Kahn/Tardiff Decl., ¶¶ 19-31.

[183] We will not further respond to the CLECs' specific arguments regarding line sharing, DSLAMs, and unbundled packet switching; our opening comments rebutted those claims. Verizon at 81-94. The D.C. Circuit's opinion confirms that there is no basis for this type of unbundling given competitive marketplace conditions. With respect to line sharing, we explained that: (1) given the multitude of alternative advanced service platforms, there is no basis for an impairment finding in the absence of access to the high-frequency portion of the loop; (2) the lack of line sharing would not impair CLECs competitively because it places them in precisely the same position as the ILECs; and (3) line sharing is inconsistent with the Act's fundamental goal of promoting facilities-based competition, violates Section 706 by constraining improvements in DSL performance, and deters deployment of substantial new fiber in the network. With respect to packet switching, we showed that: (1) the tremendous deployment of alternative packet switches confirms that CLECs are not impaired without access to this element; and (2) the Commission should eliminate the exception under which unbundled packet switching is required in certain circumstances because the existence of strong, inter-modal competition precludes a finding of impairment regardless of the loop architecture and any remaining access obligation would perpetuate a significant disincentive to deployment of additional fiber.

[184] As a threshold matter, if the Commission adopts its proposal to classify broadband services as subject to Title I rather than Title II – a position that is consistent with FCC and judicial precedent as well as sound public policy – then unbundling obligations would not apply to the facilities used to provide such services. *See* 47 U.S.C. § 153(29) (defining "network element" to include only those facilities that are used to provide telecommunications services).

investment by ILECs and CLECs alike.[185] ILECs are the insurgents, not the incumbents, and they lack market power in the provision of both consumer and large business broadband services. The cable companies dominate the mass market (with twice as many customers as the ILECs), and there are several other established and up-and-coming mass market broadband providers, including two-way satellite services, terrestrial fixed wireless, power line communications, third-generation mobile wireless, and unlicensed "Wi-Fi" services.

In an effort to sidestep these marketplace realities, the CLECs argue that other platforms are irrelevant to the impairment analysis because Section 251(d)(2) focuses on the services requesting carriers seek to offer – which, in this case, they define as broadband services provided over the ILECs' networks.[186] As the Supreme Court has instructed, however, the Commission must consider alternatives outside the ILECs' networks.[187] Consistent with that mandate, the Commission itself has emphasized that "[t]he task set out by the statute – to implement a competition policy that provides incentives for the 'deployment' of advanced telecommunications capability without regard to transmission technology – requires a special

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(Continued . . .)
We explain herein that unbundling obligations should not extend to facilities used to provide broadband services even if some of those services are regulated under Title II.

185 Verizon at 27-32, 72-76; *see also* section III above (summarizing the arguments of the high-tech industry commenters, which unanimously warned that broadband unbundling obligations depress investment). We also explained in our opening comments that the First Amendment prohibits uniquely burdensome regulation of the ILECs' broadband networks, providing a further legal imperative for discontinuing all unbundling obligations for ILEC broadband facilities. Verizon at 76-81.

186 AT&T at 190 (arguing that it is impaired in offering "DSL-based service" without access to a unified loop where the customer is served by NGDLC). AT&T's use of this argument is particularly shameful given its status as the dominant provider of broadband service in areas served by its cable properties. While AT&T notes that it is spinning off its cable ventures, and bemoans the fact that they "will be unavailable to AT&T in the future," the sale of its cable systems only calls into question AT&T's commitment to deploying broadband, rather than entitling it to UNEs. AT&T at 224; *see also* WorldCom at 106.

187 *Iowa Util. Bd.*, 525 U.S. at 389; *see also USTA*, 290 F.3d at 429.

focus on questions of intermodal and intramodal competition as they relate to broadband technology."[188] Similarly, as Chairman Powell has explained, the Commission must recognize that "[c]ompetition in the digital broadband world … will be both intra-modal and inter-modal"[189] and that the Commission must "work to keep multiple platforms and routes to the home open and viable in a broadband road."[190] And, the *USTA* opinion confirms that focusing on the services an individual CLEC seeks to offer is "quite unreasonable" where intermodal competition exists;[191] what is relevant is the state of competition in the relevant market – which in this case includes a range of technology platforms – not specific CLECs' business plans.

The broadband mass market already is subject to extensive facilities-based competition, and imposing unbundling obligations under these circumstances would undermine the continued vitality of that competition. Where the market is workably competitive, and particularly where ILECs are only minor players, imposing wholesale regulation is inconsistent with Congress's core goals. Indeed, as Drs. Kahn and Tardiff explain:

> Everything we know about competition and the conditions of economic growth bespeaks the especial importance of innovation and the dynamic competition that it promotes. That competition is, almost by definition, "intermodal"; and it is unquestionably impeded by mandatory sharing requirements imposed on incumbents operating in one single "mode"—especially at rates equated to the putatively perfectly competitive levels. The absurdity of imposing such obligations on incumbent telephone companies in the offer of broadband services, and not on cable or

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188 NPRM, ¶¶ 27-28 (Section 251(d)(2)(B) "contains no reference to the types of technology that the Commission must consider in unbundling the network.").

189 Remarks of Michael K. Powell, Chairman, FCC, Press Conference "Digital Broadband Migration" Part II, October 23, 2001, 2001 FCC LEXIS 5730, at 7 http://www.fcc.gov/Speeches/Powell/2001/spmkp109.html (last visited July 17, 2002).

190 Remarks of Michael K. Powell, Chairman, FCC, before the National Summit on Broadband Deployment, October 25, 2001, at 7, http://www.fcc.gov/Speeches/Powell/2001/spmkp110.html (last visited July 17, 2002).

191 *USTA*, 290 F.3d at 429.

> wireless, which have at least the double the market share of the former, is no greater than ignoring the similar convergence—again involving wireless and cable telephony—in the provision of local exchange services.[192]

The CLECs therefore are misguided in claiming that unbundling is necessary, notwithstanding vibrant retail competition, because other platform providers have no obligation to provide access to their networks on a wholesale basis. Where effective retail competition exists because of competition from facilities-based carriers, competitors that opt not to invest in their own facilities should have no special right of access to the ILECs' networks, especially where such access undermines the ability of all platform providers to recover their investment.

Moreover, as Verizon explained in its opening comments, in a market characterized by substantial inter-modal competition, platform owners will have an incentive to offer access to their facilities at commercially reasonable rates and terms, which preserve investment incentives while maximizing utilization of their capacity.[193] This economic certainty assures that competition will be both inter-modal and intra-modal even in the absence of government-mandated unbundling. We already have stated that "there can be significant value in maintaining a wholesale business" and that we "could deliver a service to other carriers at our central offices so that they can reach their customers over our network in return for receiving a commercially reasonable rate – a result we believe is fair and helps preserve incentives to invest."[194] Verizon is also committed to providing broadband access to non-affiliated ISPs pursuant to market-

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192 Kahn/Tardiff Reply Decl., ¶ 42.

193 Verizon at 49.

194 Letter from Thomas J. Tauke, Senior Vice President – External Affairs of Public Policy and Michael E. Glover, Senior Vice President and Deputy General Counsel, Verizon, to Michael K. Powell, Chairman, FCC, at 2-3 (Nov. 6, 2001).

driven, fair and reasonable commercial contracts.[195] Other platform providers, including wireless, cable, and satellite companies, have reached the same conclusion and already are offering wholesale access arrangements to ISPs, independent of any government compulsion to do so.[196] The natural development of a wholesale market confirms that true competition is maturing and will be sustainable.

2. The CLECs err in suggesting that the lack of investment in broadband mass market facilities is purely a demand problem.

Despite the clear evidence that BOCs will have sharply reduced incentives to deploy new facilities if forced to share them at confiscatory rates, some CLECs claim that lack of broadband subscribership and investment is a demand, rather than a supply problem.[197] The CLECs are focusing on the wrong question. As Chairman Powell has explained, regardless of whether there are demand uncertainties, an adequate supply of broadband capabilities is still necessary.[198] And, to generate the bandwidth needed to support next-generation broadband services, BOCs will need to invest billions of dollars to add substantial fiber and new electronics to their networks, and "will have to push fiber facilities deeper into the network."[199]

Broadband deployment exhibits bandwagon characteristics: "a new application will not be made available until a sufficient number of users have the capability (*i.e.*, a broadband

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195 *See* Memorandum of Understanding between the Verizon Telephone Companies and the United States Internet Industry Association (June 25, 2002).

196 *See* Verizon at 50-51 (citing examples).

197 ALTS at 6, 13-14, 30-31; AT&T at 67-73; CompTel at 31-32; IURC at 9.

198 *See* Remarks of Michael K. Powell, Chairman, FCC, to the Northern Virginia Technology Council Policymakers Series Breakfast, "The Perfect Storm" (Feb. 27, 2002) http://www.fcc.gov/Speeches/Powell/2002/spmkp204.html (last visited July 17, 2002) ("There are a lot of things to worry about on broadband, and we're worried about them, as well. But I take the position of 'get it built first' because we don't really know what we're talking about until it has a chance to flourish.").

199 Kahn/Tardiff Reply Decl., ¶ 34.

connection) to support the application; however, without the new application, users do not desire the capability."[200] Only by eliminating artificial regulatory barriers to deployment can the *market* decide what capabilities should be made available. With broader deployment, new applications will develop, as will demand for those new obligations. Such deployment, however, requires "large, risky investments"[201] – at the same time that government restrictions prevent us from enjoying the potential profits resulting from those risks. Inevitably, those restrictions – first and foremost, unbundling – deter deployment.

Some CLECs deny that unbundling deters ILEC investment by pointing out that BOCs are still deploying broadband facilities.[202] Current deployment remains limited, however, and even that is being made with the expectation that the Commission recognizes the critical need to change existing, counter-productive policies. Much more is needed in order to deploy DSL and successor technologies more broadly. Moreover, there is virtually no BOC investment in next-generation broadband infrastructure such as FTTH. ALTS seeks to downplay this fact, arguing that "very advanced broadband networks are not now economically viable."[203] Corning, however, shows that fiber can now be deployed at prices comparable to those of traditional copper plant.[204] Moreover, CLECs themselves have passed 26,000 homes with fiber (compared to 400 by BOCs).[205] The harsh reality is that the BOCs will narrowly limit deployment of next-generation broadband facilities as long as unbundling obligations remain in place.

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200 HTBC at 17.

201 Kahn/Tardiff Reply Decl., ¶ 34.

202 ALTS at 9-10; AT&T at 76-84; Allegiance at 15-17.

203 ALTS at 5.

204 Corning at 2.

205 Corning at 4.

Finally, some CLECs erroneously argue that removing unbundling obligations for broadband network facilities would decrease ILEC incentives to invest in broadband by diminishing competition from CLECs.[206] The short answer to this claim is that unbundling unquestionably deters investment, as we have explained at length and as the D.C. Circuit has affirmed. In addition, the ILECs' primary competitors in the provision of broadband services are cable companies (which have 70 percent of the market) and satellite providers (who are aggressively marketing new two-way services and are expected to be the fastest-growing segment of the industry), not the CLECs. It is a myth that ILECs deployed DSL only under pressure from CLECs. ILECs attempted to deploy technologies similar to DSL years ago in an unsuccessful effort to provide video services in competition with cable, but those services did not catch on because of a lack of capabilities at the time or excessive costs stemming in part from burdensome regulation of "video dial-tone." It was only with the burgeoning of the World Wide Web in the mid-1990s that ILECs were able successfully to deploy DSL. CLECs emerged at the same time because of the 1996 Act; there was no cause-effect relationship between the CLECs' emergence and the ILECs' deployment of DSL.

3. CLECs are not impaired in providing mass market broadband services without access to deep fiber loops.

Some CLECs argue that they will be impaired in providing mass market broadband services without access to deep fiber (fiber-to-the-curb or FTTH) loops.[207] For the same reasons that the D.C. Circuit rejected line sharing – extensive competition in the broadband market and the deterrent effect on investment – this claim also fails. Moreover, there can be no competitive impairment in any event because CLECs are in the same (or better) position as ILECs in

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206 AT&T at 73-84; WorldCom at 66-67.

207 *See, e.g.*, AT&T at 125, 133-34; MPower at 6-7; Covad at 54.

deploying broadband facilities. Although WorldCom, Sprint, and others complain of the costs of deploying fiber loops and electronics to provide DSL services,[208] the costs are similarly high for ILECs. Indeed, in many cases the ILECs' costs are higher because labor accounts for much of the expense of installing broadband facilities, and the ILECs' unionized labor force is typically more expensive than the CLECs' non-unionized labor.[209] These are costly, new technologies with unproven markets. Rather than being impaired, CLECs are simply trying to force the risk onto ILECs.

Moreover, CLECs have demonstrated that they can overbuild the ILECs' networks with fiber loops.[210] Indeed, the study attached to Corning's comments confirms that CLECs have deployed almost 60 times as many deep fiber loops as all BOCs combined.[211] In this regard, OpenBand's comments referenced in our initial filing explained that it has deployed "community-wide fiber-optic backbones, [and] fiber-to-the-home connectivity," and that, "in the current market, competitive providers, developers, and builders are ready and able to extend broadband capability to residential consumers through sophisticated and dynamic wired community arrangements."[212] In fact, the FTTH Council states that ILEC FTTH builds account for only three percent of all such builds nationwide and only one percent of FTTH access lines,[213] and concludes that CLECs "have only chosen to build their own Fiber-To-The-Home

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208 Covad at 36; Sprint at 25; WorldCom at 104-105.

209 Verizon at 90.

210 *See* 2002 Fact Report IV-15-18, Table 5.

211 CSMG Study at 51.

212 Comments of OpenBand of Virginia, *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, at 2, 5 (filed Mar. 8, 2002).

213 FTTH Council at 4.

network in situations where they could not resell ILEC DSL services."[214] CLECs, in short, are better able than ILECs to deploy Fiber-To-The-Home today, even before taking into account the investment drag created by ILEC unbundling obligations.

B. CLECs are not impaired in providing broadband services to large business customers without broadband UNEs.

Virtually all of the discussion in the record regarding broadband concerns the provision of services to the mass market. CLECs devote little, if any, attention to the provision of broadband services to business customers, and for good reason: the ILECs are bit players in this market segment, enjoying even less presence than in the broadband mass market. As we detailed in our opening comments, the major competitors in providing broadband services such as frame relay and ATM to large businesses are the principal IXCs. In addition, one study found that 29 percent of large business and 22 percent of medium-sized businesses use cable modems.[215] Collectively, the ILECs account for only 20 percent of this market.

IXCs provide broadband services to business customers using a combination of their own facilities (such as fiber access arrangements, but also including terrestrial wireless links) and special access links obtained from either ILECs or third-party sources. Given their tremendous success in this market segment, there is no conceivable basis for finding impairment. IXC arguments that despite their superior market position, they still need UNEs for access to Verizon's local network do not square with the facts. To the extent IXCs wish to rely on ILEC networks, they can (and do) purchase special access services. Because they dominate the market

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214 *Id.* at 6.

215 Morgan Stanley Equity Research North America, *Annual Telecom Services Survey: The Customer Speaks,* at 3 (Feb. 22, 2002).

segment today without use of UNEs, there can be no basis to claim they are impaired without such use.

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The substantial competition in the broadband services market mandates that the Commission free all broadband elements from unbundling obligations. This deregulatory path, besides being required by the Act, will promote the public interest in numerous respects. It will encourage the rapid deployment of next-generation broadband technologies. It will foster vigorous rivalry among a multitude of broadband platforms and providers. And, it will maximize consumer choice and stimulate a virtuous cycle of innovation and investment.

VII. TRADITIONAL DEDICATED SERVICES

Various parties have requested continued use of dedicated transport and high-capacity loop UNEs (separately or in an EEL combination) to provide two distinct types of services: special access and dedicated local exchange services. There is no basis for continuing to make these UNEs available in either market.

A. Requesting carriers are not impaired in providing special access services without unbundled transport and high-capacity loops.

The special access market is distinct from the local exchange service market. Special access customers are sophisticated and highly concentrated, with some 80 percent of ILEC special access revenues being generated from fewer than 25 percent of wire centers. Consequently, competing providers can address virtually the entire market with a targeted investment. Not surprisingly, given these circumstances, the special access market is a competitive success story.

1. The record confirms a lack of impairment.

Facilities-based competitors have captured more than one-third of the market, and the vast majority of ILEC special access revenue flow from MSAs that qualify for pricing flexibility.[216] Moreover, as described below, entities are competing successfully in downstream markets – including long distance and the provision of CMRS – without access to UNEs, further demonstrating that there is no impairment without access to unbundled dedicated transport and high-capacity loops in the provision (or use) of special access. Those entities either self-provision their own circuits or purchase access from ILECs or third parties. Accordingly, in conducting the impairment analysis, the Commission must consider the ILECs' tariffed special access services to be viable alternatives to dedicated transport. Tellingly, Norlight admits as much, stating that it has "been able to develop a successful, broadband-based business model using … special access facilities."[217]

IXCs and special access providers. Competitive access providers (including IXCs) have been competing effectively since divestiture using tariffed ILEC access services as well as self-provided and third-party access facilities.[218] They do not need individual UNEs or combinations of UNEs to continue competing effectively in the provision of long distance service.[219] While these carriers might enjoy greater profit margins by converting existing access arrangements to

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216 *See generally* Verizon at 137-38.

217 Norlight at 2.

218 *See* Shelanski Decl., ¶ 19 ("IXCs and others have been successfully providing competitive access for a decade. There is thus no case for extending unbundling obligations to special access or indeed any case in which other arrangements have proven sufficient to defeat competitive impairment.").

219 Notably, the Ohio PUC agrees that UNEs should not be made available to support the provision of toll service and points out that making UNEs available for this purpose would not advance local competition. Ohio PUC at 14-15.

UNEs, the inability to do so does not amount to impairment, as the Supreme Court has made clear.[220]

It does not matter that RBOCs are beginning to compete in the long distance market. The RBOCs' long distance operations are required to obtain access from their local exchange affiliates at non-discriminatory rates.[221] Accordingly, they enjoy no cost advantage over unaffiliated IXCs. Because all competitors are on an equal footing, there is no competitive impairment. And, in any event, WorldCom itself recently stated that the BOCs do not present a major threat in the large business segment of the interexchange market – the very customers for which special access services are primarily used.[222]

No more is necessary for the Commission to hold that IXCs (and competing providers of access to IXCs) are not entitled to UNEs or EELs. As an added imperative, however, permitting the conversion of special access to UNEs (or the substitution of UNEs for special access in the first place) would undermine the Act's primary goal of promoting facilities-based competition, as numerous CLECs have warned. For example, Time Warner Telecom has cautioned that "low prices for UNEs are primarily designed to encourage facilities-based competition. They are *not* designed to create opportunities for pure arbitrage, especially access charge arbitrage."[223]

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220 *Iowa Util. Bd.*, 525 U.S. at 389-90.

221 47 U.S.C. § 272(e)(3). This provision of Section 272 does not sunset. *See* 47 U.S.C. §272 (f)(2); *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22035 (1996) (concluding that subsections 272(e)(2) and (4) sunset along with the separate affiliate requirement but that subsections (e)(1) and (3) remain).

222 *See* "WorldCom Exec Says Bells Don't Pose Major Threat in Business Service Arena," TR Daily, May 6, 2002 (quoting WorldCom Chief Marketing Officer Brian Brewer as stating that Bell companies do not have the products, systems, or sales forces to attack the middle and high-end segments of the business services market).

223 Comments of Time Warner Telecom, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 et al.*, CC Docket No. 96-98, at 2 (filed Jan. 19, 2000).

Permitting such arbitrage would "substantially reduce [Time Warner's] incentive to expand its entry in the 21 markets it has already entered or to invest in network facilities in new geographic areas."[224] Relatedly, the availability of UNE combinations to replace special access would diminish the ILECs' ability to continue offering high-quality, innovative services by placing several billions of dollars in ILEC revenues at risk – not because of aggressive competition by new entrants, but through imposition of an arbitrary new pricing scheme on a market where rates already are competitively determined. For all of these reasons, IXCs (and the entities that provide alternative access services to IXCs) are not impaired without access to UNEs and UNE combinations.

CMRS providers. Similarly, there can be no argument that CMRS providers are impaired without access to UNEs. Like IXCs, CMRS providers have been phenomenally successful providing service using a combination of their own facilities, third-party backhaul links, and services obtained under the ILECs' access tariffs. CMRS providers now serve 130 million lines nationwide (compared to 190 million wireline access lines),[225] and they are adding 20 million new subscribers annually – far more than their wireline counterparts.[226] Wireless minutes of use grew 76 percent last year,[227] while landline minutes are growing in the low single digits.[228] In 2002, wireless revenues jumped 24 percent to $ 65 billion,[229] by 2003, wireless voice revenues

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224 *Id.* at 19.

225 2002 Fact Report II-34.

226 2002 Fact Report I-16.

227 "Rapid rise is U.S. mobile telephone usage – survey," ("Mobile Telephone Usage") http://biz.yahoo.com/rc/020520/telecoms_wireless_survey_1.html (last visited May 22, 2002).

228 2002 Fact Report I-16.

229 Mobile Telephone Usage.

are expected to surpass wireline voice revenues, and by 2006, the number of wireless access lines will exceed the number of wireline access lines.[230] CMRS providers, indisputably, are not impaired without access to UNEs or UNE combinations.

Because CMRS providers have been a competitive force in the market for several years without making use of UNEs, the Commission should not re-define links between base stations and MSCs as dedicated transport, as several CMRS carriers urge.[231] There can be no impairment in the face of such robust competition.[232] In any event, even aside from the evident lack of impairment, there is no basis for the CMRS carriers' claims that the existing definition of "dedicated transport" includes base-station-to-MSC links. Under the Commission's rules, ILECs must provide unbundled dedicated transport only "between LEC central offices or between such offices and those of competing carriers."[233] The links between cell sites or base stations and MSCs do not meet this definition. The purpose of the base station is to allocate shared resources (wireless bandwidth) among multiple users of the network who are not all using their wireless phones at the same time.[234] It is the mobile switching center – not the base station – that is linked to the switched telephone network and orchestrates the intra-switch hand-offs of live calls.

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230 2002 Fact Report, Figure 10.

231 *See* Arch Wireless at 12; AT&T Wireless at 6-7, 8-11; Dobson at 8-11; CTIA at 7-9; MDP/CCG at n.10; Nextel at 3-4, 6-7; Progress Telecom at 5-7, 10-11; Sprint at 47-48; VoiceStream Wireless at 2-8.

232 In any event, changing the definition of dedicated transport to include base stations would be futile because the vast majority of cell site-to-mobile switch links must be constructed, *see* Verizon at 112-13, but ILECs have no obligation to build transport facilities for requesting carriers. *See Local Competition Order*, 15722 ("we expressly limit the provision of unbundled interoffice facilities to *existing* incumbent LEC facilities").

233 47 C.F.R. § 51.319(d)(1); *Local Competition Order*, 15718

234 2002 Fact Report V-21.

Finally, there is no legitimate argument that CMRS providers suddenly need UNEs because they are beginning to compete directly against wireline telephony service. CMRS providers have been a competitive force in providing second-line and even primary line service for several years without making use of UNEs, and they are expected to be an even more potent presence in the market in the near future, again without using UNEs.[235] That CMRS providers must incur certain costs to connect their base stations and MSCs is irrelevant. ILECs face the same types of costs to provide wireline services, and therefore CMRS providers are not competitively impaired. While CMRS providers might enjoy cost savings from converting their special access services to UNEs, the inability to do so, once again, is not tantamount to impairment. Accordingly, regardless of whether MSC-to-base station links are considered dedicated transport (which they are not, as discussed above), CMRS providers are not impaired without access to UNEs or UNE combinations and thus have no right to access these facilities.

2. Arguments that special access services are priced "too high" are unavailing.

Although some CLECs claim that special access rates are too high to enable them to compete successfully, the marketplace facts prove otherwise. Indeed, their argument is nothing more than an extremely late challenge to the Commission's pricing flexibility regime. And, in any event, the Commission has just reiterated that there is no inconsistency between price increases and the competition-driven pricing flexibility framework: "As previously stated in our *Pricing Flexibility Order*, some price increases may be warranted because our rules may have required incumbent LECs to price access services below cost in certain areas. Moreover, in

235 *See generally* 2002 Fact Report II-33-37.

response to these price increases, no commenter has filed a complaint or otherwise alleged that the price increases are unreasonable."[236]

Finally, even if CLECs' arguments were on point, which they are not, the existence of a cost difference between the ILECs' access transport service rates and their UNE rates for dedicated transport is immaterial. The special access market is competitive; facilities-based CLECs already have captured roughly one-third of the market, and ILECs have received Phase I or Phase II pricing flexibility in MSAs that account for a significant majority of special access demand.[237] Consequently, any cost difference merely confirms that the TELRIC-based UNE rates are arbitrarily low. Given the availability of competitively disciplined special access services, there can be no impairment.

B. Requesting carriers are not impaired in providing local exchange services without access to unbundled dedicated transport, dark fiber, and high-capacity loops.

1. Dedicated transport/dark fiber

a. The record confirms that alternatives to the dedicated transport/dark fiber UNEs are widely available.

The Commission should eliminate dedicated transport and dark fiber from the list of UNEs because non-UNE alternative facilities are widely available and can be deployed wherever there is demand. Accordingly, requesting carriers are not impaired in offering competitive local exchange services without these UNEs.

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236 *Petition for Pricing Flexibility for Special Access and Dedicated Transport Services for Ameritech Operating Companies, Pacific Bell Telephone Company, Southern New England Telephone Company, and Southwestern Bell Telephone Company*, Memorandum Opinion and Order, ¶ 11 (rel. Apr. 11, 2002).

237 Verizon already has received Phase I or Phase II pricing flexibility in MSAs representing 66 percent of our interstate special access revenues, and Phase II pricing flexibility in MSAs representing 50 percent of those revenues.

In the past three years, CLEC fiber deployment has almost doubled. Today there are nearly 1800 CLEC networks in the top 150 MSAs, CLECs have deployed almost 184,000 fiber route miles, and one or more CLECs has obtained fiber-based collocation in BOC central offices accounting for 54 percent of business lines and 44 percent of all access lines.[238] In the top 100 MSAs, there are one or more fiber-based collocators in wire centers accounting for 61 percent of all access lines.[239] Importantly, the competitive picture is even brighter than these numbers indicate, because they do not account for the availability of local fiber from wholesalers,[240] utilities,[241] and long distance companies.[242]

Although the CLECs generally assert that they must rely on ILEC dedicated transport on a large number of routes, at least for DS-1 facilities, their own evidence reveals that they often have alternative sources. And, of course, they have access to ILEC special access services everywhere and have successfully used those services to compete. For example, Covad admits that it obtains 50 percent of its transport from competitive carriers.[243] This concession is particularly telling because Covad pursues a blanket collocation strategy, seeking a presence in

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238 2002 Fact Report III-3-7.

239 2002 Fact Report III-3 and Table 2. Moreover, 38 percent of all central offices contain more than 5000 business lines, and these offices contain some 84 percent of all business lines – levels deemed sufficient to justify the deployment of competitive transport facilities. *Id.* III-3.

240 One web site lists 35 wholesalers offering over 10,000 local route miles in 60 cities in 23 states. 2002 Fact Report V-9.

241 Utilities control some 35 percent of the nation's fiber. 2002 Fact Report III-10, 13, Table 6.

242 *See* 2002 Fact Report III-10-11, 14, Table 7.

243 Covad at 67-69.

virtually every central office in the areas that it serves.[244] Likewise, Conversent acknowledges that it purchases dedicated transport and dark fiber from three competitive providers, and that it "can and does" self-provision dark fiber.[245] Further, several CLECs state (more often to the SEC than the FCC) that they have extensive local transport networks of their own. AT&T, for example, reports that it has over 17,000 fiber route miles and is collocated in over 1000 ILEC end offices (not counting the large number of additional collocations it acquired from NorthPoint).[246] XO has over 22,200 route miles,[247] and Time Warner Telecom's network contains over 16,800 route miles.[248]

The marketplace evidence dispels any notion that new entrants generally are impaired in providing local exchange services without access to unbundled dedicated transport and dark fiber.[249] In a large and growing number and variety of locations, CLECs already have deployed their own alternative facilities or can obtain dark or lit fiber from a wholesaler. In many other locations, alternatives may not yet be available, but could readily be constructed. The fact that

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244 See Declaration of Mark Shipley and Marie Change at Table 1 attached to Comments of Covad Communications Company, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 et al.*, CC Docket 96-98, at 10 (filed June 11, 2001).

245 Conversent at 9-10.

246 AT&T at 52-53; AT&T Lesher/Frontera Decl., ¶ 45.

247 XO 10-K at 43.

248 TWT 10-K at 3, 25. Other examples abound: Neon's "technologically advanced, high-bandwidth fiber optic network" consists of approximately 2,000 route miles, Progress Telecom reports that its network has 7,200 fiber route miles and 150 POPs, and KMC's network consists of over 2,100 fiber route miles in 35 different markets. *See* NEON Form 10-K Annual Report for the year ending December 31, 2001, at 2; Progress Telecom at 2; CLEC Coalition at 89-90.

249 *See USTA*, 290 F.3d at 423 (noting evidence that, as of 1999, CLECs had deployed transport facilities in all of the top 50 markets and criticizing the Commission's dismissal of that evidence as not reflecting the actual availability of alternatives: "because the Commission has loftily abstracted away all specific markets, and because its concept of impairing cost differentials is so broad … we have no way of assessing the real meaning of that conclusion").

entrants continue to use ILEC dedicated transport and dark fiber, often for a significant portion of their routes, is therefore immaterial. As long as these UNEs are available, particularly at arbitrarily low rates, CLECs will use them even though they could justifiably invest in their own, alternative facilities. That is not competitive impairment, however; it is merely risk-shifting.

b. CLEC claims of impairment are unfounded and contradicted by the record evidence.

The CLECs uniformly maintain that they are impaired in providing local exchange services everywhere without access to unbundled dedicated transport and dark fiber. Rather than confronting the marketplace evidence, which shows a tremendous growth in alternatives since the UNE Remand Order, the CLECs merely reiterate the same arguments they made three years ago: (1) that it is "uneconomical" and "rarely justified" for CLECs to deploy their own interoffice transport and dark fiber, and (2) that at least one truly "ubiquitous" alternative must exist before this UNE can be discontinued.

There is no basis for even considering these claims. Time and again, CLECs have decided that it makes sense to deploy their own transport facilities, or use third-party alternatives, notwithstanding their professed concerns regarding cost and ubiquity, precluding a conclusion that CLECs generally are impaired without access to unbundled dedicated transport and dark fiber.

(1) Alternative providers can economically deploy their own interoffice transport and dark fiber.

The costs of constructing alternative transport facilities do not create impairment. As a dispositive matter, the marketplace evidence refutes the CLECs' unsubstantiated claims that it

would be "prohibitively expensive" or "uneconomical" to deploy such facilities.[250] Rather, the data confirm that a multitude of CLECs have built, and continue to build, extensive interoffice transport and dark fiber networks.

Nor are the specific cost elements referenced by the CLECs unique to those carriers or so burdensome as to constitute impairment; they are simply costs of market entry, and thus not cognizable under *USTA*. The cost of obtaining fiber and paying whatever fees a municipality may charge are generally the same for ILECs and CLECs,[251] and new technologies hold the promise of dramatically reducing the expense of deployment.[252] Moreover, contrary to the CLECs' claims, collocation costs are not a barrier to competition; such fees are regulated by state commissions and have declined with the availability of cageless and shared collocation arrangements. Indeed, the tens of thousands of existing CLEC collocation arrangements confirm that collocation is not a barrier to transport competition.

In addition, as detailed *supra* in section IV.B, arguments that replicating the ILECs' entire network would require "monumental" costs are misplaced and irrelevant.[253] Not only do these assertions ignore the highly concentrated nature of the dedicated transport market, but they also fail to recognize that no new entrant strives to duplicate the ILECs' entire existing

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250 *See e.g.*, CLEC Coalition at 90-91; Dark Fiber Coalition at 26-28; AT&T at 123-131; Nextel at 4; Z-Tel at 69-70. *Cf*. Conversent at 8-9 (estimating that it would cost $30 million to replicate Verizon's 609 route-mile rings).

251 Indeed, as our comments explain, CLECs may face lower labor costs – a major proportion of overall deployment costs – given the fact that their labor forces generally are not unionized. Verizon at 90.

252 *See* 2002 Fact Report at III-8; Verizon at 111-112.

253 *See e.g.*, Dark Fiber Coalition at 26-28; WorldCom at 76-78; AT&T at 123-25; AT&T Wireless at 8-11; CLEC Coalition at 88-91.

networks.[254] Rather, CLECs can address the vast majority of demand for dedicated transport by focusing on a small minority of central offices – which is, not surprisingly, the precise strategy they have chosen to follow.

Finally, the CLECs' cost-related arguments are, at best, incomplete because they fail to consider: (1) the CLECs' cost advantages; (2) the diseconomies faced by ILECs; and (3) all available sources of CLEC revenue.[255] Impairment cannot be found solely because a new entrant must make an investment to deploy its own facilities and cannot expect immediately to recover that investment; otherwise, CLECs would always be impaired (which is, of course, their position). It is fine to claim that it costs thousands or even millions of dollars to establish an alternative transport link to a central office, but that fact alone, even if true, reveals nothing about impairment.

(2) **The notion that "ubiquitous" alternatives must exist before dedicated transport can be de-listed is belied by actual experience.**

The Commission should not be distracted by CLEC arguments that competitors are impaired without access to "ubiquitous" alternative dedicated transport connecting every central office to every other central office.[256] Even if this argument could properly be raised – which it cannot, after *USTA* – our comments explain that this is not how the ILECs' networks are constructed. Every ILEC wire center is not connected directly to every IXC's POP; nor is every

254 *See* Section IV.B *supra*.

255 *Id*. Furthermore, as the Supreme Court recognized, the fact that it may be more expensive to deploy or use alternative facilities than to purchase UNEs is irrelevant: if a CLEC is capable of competing without using UNEs, it does not matter whether it is "'impaired' in its ability to amass earnings." *See Iowa Util. Bd*., 525 U.S. at 390; *see also GTE*, 205 F.3d at 424.

256 UNE Platform Coalition at 52-55; Allegiance at 26-30; Covad at 66-67; Dobson at 8-11.

ILEC wire center directly connected to every other ILEC wire center.[257] Rather, ILECs predominantly use hub-and-spoke arrangements, as well as some direct connections, and CLECs do as well.

More importantly, the CLECs' arguments misrepresent the market: as noted above, the demand for dedicated transport is highly concentrated. Because CLECs target the densest areas first, their revenues presumably are even more concentrated. Thus, even assuming the veracity of claims that alternative providers are available in only 15 percent of wire centers, this figure sheds little light on the competitive nature of the market.[258] Neither ILECs nor CLECs need to connect all wire centers via dedicated transport. Alternative facilities already exist at wire centers accounting for the majority of demand for dedicated transport, and they can readily be built to additional wire centers.

What is more, it is irrelevant that no individual CLEC may have a network that reaches all central offices. CLECs can and do access a large number of central offices without collocating there directly, simply by combining their own facilities with transport arrangements from other carriers, either through direct interconnections or through collocation at a carrier

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257 Verizon at 109-110.

258 *See* ALTS at 63-64. To obtain a more accurate picture of the competitive nature of the market, the Commission should evaluate the BOCs' receipt of pricing flexibility. In so doing, the Commission would find that eighty percent of BOC special access revenues qualifies for Phase I relief, and almost two-thirds qualifies for Phase II relief. Special Access Fact Report, at 5-7, attached to the Joint Comments of SBC and Verizon, *Implementation of Local Competition Provisions in the Telecommunications Act of 1996 et al.*, CC Docket No. 96-98 (filed Apr. 5, 2001) ("Special Access Fact Report"). *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers' Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14299 (1999); 47 C.F.R. § 69.711(c) (stating that, to obtain Phase II relief for dedicated transport and special access services, ILECs must demonstrate that unaffiliated competitors have collocated in at least 50 percent of the LEC's wire centers within an MSA, or have collocated in wire centers accounting for 65 percent of the LEC's revenues from these services within an MSA).

hotel. ILECs are not the sole, and in many cases are not even the primary, points of traffic aggregation. Indeed, the IXC market, which AT&T and WorldCom are so fond of using as an example of successful competition policy, presents an analogous situation that confirms there is no impairment. Other than AT&T and perhaps WorldCom, no IXC has a POP in every LATA – but hundreds of IXCs nonetheless are able to serve customers nationwide by obtaining transport from other facilities-based carriers.

Finally, CLECs are not impaired by using several providers of transport, notwithstanding their unsupported assertions to the contrary. Indeed, the CLECs' own statements prove otherwise. For example, CTC purchases "local fiber in selected geographical areas of eastern Massachusetts, southern New Hampshire, southern Maine and Rhode Island" from "a number of dark fiber suppliers," enabling it to "extend CTC's existing high bandwidth fiber network backbone to Verizon local switching offices" and "*eliminate* the need for leased inter-office Verizon facilities."[259] Similarly, Allegiance has leased fiber from alternative suppliers in 19 markets, and has stated that "[t]hese fiber rings are expected to provide Allegiance with a reliable diverse connection to most of its central office collocations throughout a market."[260] Building a network from a variety of suppliers rather than a single source thus creates no appreciable operational impediment.

(3) The Commission must reject requests to expand the dedicated transport UNE.

A few CLECs argue that SONET rings should be part of the transport UNE,[261] and that continuous dark fiber should be made available through splicing without the need for collocation

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259 Special Access Fact Report at 15-21 (emphasis added).

260 *Id*.

261 *See* AT&T Wireless at 30-32; Covad at 74; CLEC Coalition at 93-94; Sprint at 45-46.

in intermediate central offices.[262] Because requesting carriers are not impaired without access to dedicated transport or dark fiber as currently defined, there is no basis for retaining, let alone expanding, these UNEs. Nonetheless, we discuss these requests briefly below.

SONET. There is no merit to CLECs' claim that they are impaired without access to unbundled SONET rings because viable alternatives do not exist. Nor should CLECs be able to convert special access SONET rings into UNE SONET ring transport, with or without penalty.[263] In the UNE Remand Order, the Commission "reject[ed] Sprint's proposal to require incumbent LECs to provide unbundled access to SONET rings."[264] The CLECs have failed to proffer any new evidence or justification for revisiting this holding. Moreover, there can be no impairment because ILECs and CLECs are in the same position with respect to the deployment of new fiber to construct SONET rings, and, as the CLECs concede, tariffed SONET transport is an available alternative for CLECs that do not want to build their own rings or obtain access from a wholesale supplier.

Dark fiber. Similarly, there is no basis for requiring expanded access to dark fiber.[265] New entrants and ILECs have the same ability and face the same challenges in deploying dark fiber, so there can be no competitive impairment. Granting the relief these parties seek also would compel ILECs to build new facilities in some cases and to permit interconnection at points that are not normally accessible, contrary to the Act's requirements. Dark fiber should be de-listed, not subject to even greater unbundling.

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262 Dark Fiber Coalition at 36-46; Sprint at 28-29.

263 *See* CLEC Coalition at 93-94; AT&T Wireless at 30-32; Covad at 74; Sprint at 45-46.

264 *UNE Remand Order*, 3843.

265 Dark Fiber Coalition at 36-46; Sprint at 28-29.

2. High-capacity loops

a. The marketplace evidence shows substantial deployment of alternative high-capacity loop facilities wherever there is likely to be demand for services using this element.

Because entities seeking to provide competitive local exchange services routinely deploy their own high capacity loops wherever there is demand for such services, the Commission must presume that this UNE should be de-listed nationwide, absent compelling evidence of impairment in specific circumstances. To date, no such evidence has been forthcoming, as the vast majority of CLECs simply assert impairment without providing supporting data. Indeed, the CLECs raise exactly the same generalized impairment arguments as they did in 1999, maintaining that it is time-consuming and requires "astronomical" costs to deploy their facilities, and that there are not ubiquitous alternatives to the ILECs' high-capacity loops. The paucity of CLEC data is telling, and stands in stark contrast to the evidence we have submitted and to the CLECs' own public statements, which show widespread availability of both competitive wireline facilities and inter-modal alternatives (such as free space optics).

To recap: CLECs serve between 11 and 19 million business lines throughout the country using their own loop facilities.[266] In addition, CLECs already connect to some 175,000 commercial office buildings,[267] and their fiber networks are so pervasive that both CLECs and wholesale fiber suppliers tout their willingness to extend their networks to new buildings as needed.[268] Moreover, the lack of demand for this UNE confirms the lack of impairment; fewer

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266 These figures actually understate the extent of CLEC deployment, because the CLECs now serve at least 156 million voice-grade equivalent circuits. 2002 Fact Report I-5, Table 4. Further, this figure is undoubtedly much higher in areas where the largest business customers are concentrated. 2002 Fact Report IV-2.

267 Special Access Fact Report at 11.

268 2002 Fact Report IV-4-5; Verizon at 116-17.

than one percent of the CLECs' business lines are served using unbundled high capacity loops.[269] And, in the relatively rare instances when CLECs do purchase unbundled high-capacity loops, the vast majority are DS-1 loops – CLECs have purchased only 140 DS-3 loops and not a single loop above the DS-3 level.[270]

Notably, the scant evidence proffered by the CLECs actually makes our case for us. For example, Allegiance states that CLECs reach *60 percent* of their business customers without using ILECs' facilities.[271] KMC says that it has fiber that passes within 1200 feet of nearly *97,000* office buildings.[272] Although WorldCom reports to the Commission that CLECs provide DS-1 and DS-3 loops to only 30,000 office buildings nationwide,[273] its Chief Technical Officer has boasted to the press that WorldCom alone has fiber to some *50,000* office buildings and campuses.[274] Similarly, while WorldCom complains to the Commission that adding a new building to its existing local network is "extremely expensive" and "time-consuming" so that

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269 Using even the most conservative figure of 11 million CLEC business customers, CLECs use UNEs to reach their business customers only 0.6 percent of the time. 2002 Fact Report IV-6-7; Table 2 & Figure 2.

270 *Id.*, IV-6, Table 2. WorldCom nonetheless makes the unsubstantiated claim that it is "likely" that CLECs rely on ILECs' facilities for DS-3 loops to reach some unspecified number of commercial office buildings. WorldCom at 76. Such a claim cannot be credited in light of the marketplace evidence.

271 Allegiance at 22 (explaining that CLECs "must rely on ILEC end-user connections to serve approximately 40 percent of business customers."). While some CLECs may use the ILECs' facilities 40 percent of the time, there is no support for Allegiance's assertion that they "must" do so. As long as UNEs are available, they will be used even where self-deployment of wireline facilities, third-party wireline alternatives, inter-modal alternatives, and ILEC special access services are viable choices.

272 Affidavit of Michael P. Duke., ¶ 6 (April 4, 2002) attached to CLEC Coalition ("KMC Duke Aff.").

273 WorldCom at 75 (it is unclear from WorldCom's comments whether the 30,000 is an aggregate for both DS-1s and DS-3s).

274 Eric Krapf, *Fiber Access: The Slog continues; Industry Tent or Event*, Business Communications Review, Aug. 1, 2001, at 38 (quoting Fred Briggs, WorldCom's Chief Technical Officer) ("Fiber Access").

only a "limited" number of buildings are added to its local network each year,[275] its Technical Officer has stated that, with technological advancements, "you can afford to extend your local footprint"[276] and that "[a] lot of what we do today is simply extend the capability we may already have in an existing metro market."[277] XO similarly asserts that it "use[s] a variety of technologies to connect our customers directly to our networks, …. [and] can connect a high percentage of the area's commercial buildings using these technologies, rather than connections leased from third parties."[278]

Moreover, notwithstanding the downturn in the economy, CLECs are still expanding their networks. Time Warner Telecom, for example, just told the SEC that it "continues to extend its network in its present markets in order to reach additional commercial buildings with its fiber facilities."[279] American Fiber Systems ("AFS") recently announced the completion of a metro fiber network in the Cleveland area connecting high-density business parks, carrier hotels, IXC points of presence, and ILEC central offices; that network is in addition to AFS's existing fiber networks in Kansas City, Salt Lake City, Minneapolis, St. Paul, and Nashville.[280] Con Edison Communications has initiated a "PowerLan Ethernet" service in New York City, using fiber run though electrical conduits to offer a "high-bandwidth, low-cost alternative to current

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275 Declaration of Edwin Fleming, ¶¶ 8-10 (June 11, 2001) attached as Attachment B to WorldCom ("WorldCom Fleming Decl.").

276 Fiber Access.

277 *Id.*

278 XO 10-K at 6.

279 TWT 10-K at 3.

280 *See Communications Daily,* July 3, 2002, at 8.

networks."[281] It is marketing this service to business customers and other carriers. And IDT, which bought WinStar's assets out of bankruptcy, intends to connect 600 new buildings to WinStar's fixed wireless network in 22 cities.[282]

Against this background, the CLECs' unsupported claims of generalized impairment do not merit serious consideration. Rather, as we demonstrate below, the CLECs' assertion that they cannot compete effectively without access to unbundled high-capacity loops is meritless.

b. There are no obstacles to competition using alternatives to unbundled high-capacity loops.

CLECs contend that the cost and time required to deploy alternative high-capacity loops, and the asserted lack of ubiquity of non-ILEC alternatives, place them at a disadvantage to ILECs, but they present no supporting evidence. Absent such a showing, there is no basis for finding competitive impairment.

(1) **The CLECs face no cost disadvantage.**

The CLECs' specific cost claims do not come close to demonstrating impairment. While some CLECs point to excessive fees for access to public rights-of-way,[283] those fees by law must apply on a nondiscriminatory basis to ILECs and CLECs[284] and, moreover, are merely costs of entry.[285] In any event, the vast majority of municipalities impose fees that are rationally based on the costs imposed by fiber deployment rather than revenues, and local governments that do

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281 Tiffany Kary, *In New York, Ethernet Goes Electric*, CNET News.com, May 30, 2002.

282 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Seventh Report, FCC 02-179, ¶ 33 (July 3, 2002) ("*Seventh CMRS Competition Report").*

283 *See, e.g.*, AT&T at 143.

284 *See* 47 U.S.C. § 253.

285 *USTA*, 290 F.3d at 427.

impose revenue-based fees do so on ILECs as well, precluding any claim of competitive impairment.

The same holds true for the minority of building owners that seek unreasonable payments for building access.[286] The Commission has banned exclusive access arrangements in commercial buildings, and as long as the ILEC is in a building, a CLEC has the right to use the ILEC's in-building risers and conduits to reach its customers.[287] In addition, studies submitted in the Competitive Networks docket suggest that whatever fees are being charged by building owners are not appreciably deterring entry.[288] Thus, while isolated abuses may remain, the problem of excessive building access fees is not nearly so prevalent as the CLECs would have the Commission believe. Finally, ILECs cannot reasonably be penalized if some municipalities or building owners may be unwilling to negotiate reasonable access arrangements with CLECs. That issue should be solved through the legal process, not by finding impairment and forcing ILECs to share their networks even where competitive alternatives exist.

In any event, actual marketplace evidence of CLEC deployment demonstrates that the deployment of alternative high-capacity loops is not cost-prohibitive and confirms that the CLECs' limited cost data are unreliable. For example, WorldCom alleges that extending fiber to

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286 *See, e.g.*, AT&T at 146.

287 Of course, if the ILEC is not in a building, there can be no impairment.

288 A Building Owners and Managers Association (BOMA) survey covering roughly 2100 commercial buildings reported that 80 percent of the respondents said they had more than one telecommunications service provider, and almost 60 percent offer their tenants a choice of three or more providers. Ex parte filing of the Real Access Alliance, *Promotion of Competitive Networks in Local Telecommunications Markets, et al.*, WT Docket No. 99-217, at 3 (filed June 16, 2000). In Washington, D.C., one of the largest landlords has indicated that it has granted access to an average of 6.5 CLECs in its buildings, and forty percent of that landlord's properties are served by at least 8 CLECs. *Id.*, Declaration of Barry M. Krell (CarrAmerica). Moreover, fewer than one percent of tenants have reported that building management has denied a request to obtain service from a telecommunications provider not already servicing the building. Further Reply Comments of the Real Access Alliance, *Promotion of Competitive Networks in Local Telecommunications Markets, et al.*, WT Docket No. 99-217, at Exh. C (filed Feb. 21, 2001).

a building within a few hundred feet of its network costs $ 250,000.[289] In reality, however, the costs of building links from an existing ring to new customers are manageable; a more reasonable estimate of the cost of extending a network 500 feet to reach a building is approximately $ 40,000 to $ 47,000.[290] In fact, the CLECs likely enjoy considerable cost advantages over the ILECs; their labor costs are lower, and labor is 50 percent of the cost of deploying fiber. In addition, CLECs often utilize next-generation technologies such as SONET-lite, Metro DWDM, and Gigabit Ethernet, which are considered 30 to 70 percent more cost-efficient than the ILECs' legacy networks.[291] Indeed, WorldCom has admitted that new optical technologies are "most cost effective, not only in terms of the capital but the maintenance …."[292]

(2) **CLECs can timely deploy alternatives to unbundled high-capacity loops.**

Nor is there any basis to claims that CLECs are impaired in their ability to self-provision high-capacity loops due to inherent delays that prevent timely deployment. Notably, the CLECs concede that actual construction time does not cause material delays: "the most time consuming part of the process is not the construction itself, but the negotiation of rights-of-way and building access agreements"[293] – a process that they claim can take several months.[294] The CLECs also point to that old stand-by, collocation-related delays, as a source of impairment.[295]

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289 *See* WorldCom Fleming Decl., ¶ 8.

290 *See CLEC Network Extension Cost Model*, Cambridge Strategic Management Group, CC Docket 96-98 (filed Apr. 26, 2001).

291 2002 Fact Report IV-5; Verizon at 121.

292 Fiber Access.

293 WorldCom Fleming Decl., ¶ 9.

294 AT&T at 146-148; ALTS at 56-58; Dark Fiber Coalition at 20-23; WorldCom at 75-76; CLEC Coalition at 28.

295 *See, e.g.*, AT&T at 145.

Once again, CLECs are not competitively impaired because the time it takes to deploy high-capacity loops is the same for CLECs as it is for ILECs.[296] For example, there is no evidence that it takes CLECs longer than ILECs to negotiate building access agreements.[297] The CLECs also ignore the fact that, once a CLEC has a franchise in a municipality, it need not go through the franchise approval process again – it only has to secure the necessary right-of-way permit or, further streamlining the process, can elect to use the ILEC's rights-of-way.[298]

Likewise, the CLECs are wrong in asserting that there are collocation-related delays that constitute impairment. Collocation requests can be processed concurrently with the permit and construction process, so they introduce no additional delay. Moreover, ILECs must implement collocation arrangements within strict deadlines or face severe penalties. The sheer number of new collocation arrangements – including 20,000 in the last three years alone – lays to rest any allegation that the time required to implement such arrangements is a barrier to competition.[299]

Similarly, the Commission should not accept arguments that CLECs are impaired because they require six to nine months to extend their networks to additional buildings, while standard intervals in ILEC tariffs for installing DS-1 circuits range from 7 to 10 business days. Whatever time it takes to reach a new building obviously is not a major obstacle to competition, given the substantial and expanding deployment of alternative facilities to date. Further, to mitigate any delay while deploying facilities, CLECs can provide service by obtaining ILEC

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296 Verizon at 121.

297 *Id.* (explaining that recent reports indicate that the time to negotiate building access has decreased from 5 months in 1999 to 3 months today).

298 Furthermore, while a few municipalities have imposed moratoria on new construction, those restrictions apply equally to ILECs. *See* AT&T at 141-146. And, even when a moratorium has been instituted, the CLEC remains free to use the ILEC's ducts, conduits, and rights-of-way.

299 2002 Fact Report I-4, Table 2.

special access channel terminations at competitively disciplined rates. As the CLECs confirm, "channel terminations are essentially the same as high-capacity loops."[300]

The CLECs also ignore the existence of viable and cost-effective inter-modal alternatives, such as unlicensed free space optics and licensed fixed wireless. According to the CLECs' own data, CLECs can and do use fixed wireless loops, which may be rapidly deployed, as both interim measures and permanent means of providing high-capacity service to business customers. As XO admits, for example, it "deploy[s] a high-bandwidth wireless connection between an antenna on the roof of the customer's premises and an antenna attached to our fiber rings. These wireless connections offer high-quality broadband capacity, take less time to install, … and cost less than fiber connections."[301] In addition, free-space optics technology, which uses laser beams to relay massive amounts of data from one building to another, provides another means of reaching new buildings "when fiber-optic lines don't extend the 'last mile' to offices."[302] Free space optic equipment can be installed in a matter of days for a fraction of the cost of deploying fiber; as one analyst has explained, FSO "is cheap, easy to deploy and offers extremely high capacity."[303] In fact, recent advances couple free space optics with 60 GHz millimeter wave technology to provide "continuous, error-free communications (up to 1.25 Gbps) and 99.999% availability over 1 kilometer," regardless of the weather.[304] AirFiber, a

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300 Sprint at 24, n.27.

301 XO 10-K at 16.

302 Byron Acohido, "Free-Space Optics Offer Fast Data with Fewer Physical Links FSO's Lasers Lessen Need to Directly Tap Fiber-Optic Lines," *USA Today*, Feb. 1, 2001, at B1 ("Free Space Optics").

303 *Id.* (quoting Lindsay Schroth, an analyst at The Yankee Group).

304 Press Release, "AirFiber Introduces New Wireless Technology Combination," http://biz.yahoo.com/bw/02-529/290102_1.html (last visited May 29, 2002).

leading vendor of free space optics equipment, explains that this new product has "the ability to bridge the [last mile] gap with a solution that is much less expensive than fiber, requires no expensive frequency licensing or permitting, and can be installed in hours rather than months."[305]

Finally, the CLECs create a strawman in arguing that they cannot begin deploying facilities to a new building unless they have a customer, but that customers do not want to wait several months for service.[306] For customers in new buildings, both CLECs and ILECs face the same time constraints, and arrangements for telecommunications can be timed so that the facilities are ready when the building becomes available for occupancy. In existing buildings, CLECs routinely sign up customers and switch them to their own facilities once they have been deployed. In the interim, as noted above, CLECs can use special access channel terminations, inter-modal alternatives, or resale.

(3) **Alternatives to unbundled high-capacity loops can be deployed wherever there is likely to be demand.**

The CLECs' final claim – that they are impaired due to the lack of ubiquitous alternatives for high-capacity loops – is unavailing.[307] Requesting carriers do not need ubiquitous alternatives to provide services based on high-capacity loops, because demand for these services is highly concentrated. As we have explained previously, roughly 20 percent of wire centers account for 80 percent of the revenues from high-capacity services. Accordingly, through targeted investment and use of viable alternatives, CLECs can reach the vast majority of

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305 *Id.* AirFiber states that its hybrid free space optics/millimeter wave technology "is completely transparent to the network and occurs with absolutely no loss of data and provides a fiber-like quality to a wireless transmission." *Id.*

306 *See, e.g.,* AT&T at 127.

307 ALTS at 49, 51-52; Covad at 48-50; Dark Fiber Coalition at 13-16; WorldCom at 76.

customers that are likely to require high-capacity services without relying on unbundled high-capacity loops.

Some CLECs assert that they need unbundled DS1 loops to serve small businesses that may be located outside core urban areas.[308] To the extent DS1 loops are used in this manner, such use accounts for a very small portion of overall demand. Moreover, the Crandall Declaration submitted last year in conjunction with our Joint Petition reflects the fact that some relatively small businesses may purchase services utilizing these facilities. It nonetheless demonstrates that, in the vast majority of cases, it is worthwhile for a CLEC to serve a DS-1 customer using its own facilities. (That smaller customers may be located relatively far from downtown business areas is not dispositive of impairment, since the CSMG analysis we submitted last year shows that the costs of building out competitive facilities are not significantly distance-sensitive.) Even if there were a minority of customers for whom non-ILEC high-capacity loops could not economically be deployed, such circumstances do not justify a universal unbundling requirement for these loops. Not only is there no impairment with respect to such facilities in the vast majority of cases, but there is also no impairment with respect to carriers (if any) that focus on serving that small minority of customers. Such CLECs could provide service using unbundled DS-0 loops or special access channel terminations, either from the ILEC or from a competitive provider, and could employ inter-modal alternatives such as free space optics or terrestrial wireless.

[308] There can be no serious claim that continued unbundling of DS-3 or higher-capacity loops is required, given the virtually nonexistent demand for such facilities.

It is irrelevant that alternative facilities do not yet reach all buildings where customers require service over high-capacity loops.[309] The extensive scope and continuing expansion of those alternatives demonstrate that there is no widespread obstacle to self-deployment or use of third-party loops. CLECs therefore cannot legitimately equate the absence of alternatives in particular locations with "reliance" on unbundled loops in those locations, and they certainly cannot bootstrap isolated current (and undoubtedly temporary) lack of alternatives in particular locations into a finding of generalized impairment. If CLECs have not yet built out to a building where demand exists, it is only because they have chosen to focus first on buildings presenting more lucrative opportunities, not because they cannot do so.

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For these reasons, the Commission must presume that requesting carriers are not impaired in providing local exchange services without access to unbundled high-capacity loops, in the absence of specific evidence to the contrary in particular circumstances. Once again, no such evidence has been presented to date.[310]

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[309] Some CLECs go farther, arguing that even when their fiber reaches a building, it may not reach all floors in the building. *See* AT&T at 146. Even if true, this is not tantamount to competitive impairment. Once in a building, it is a simple matter to extend fiber to additional floors. If the in-building risers and conduits are owned or controlled by the ILEC, the CLEC has a right to use those facilities. If the risers and conduits are owned or controlled by a landlord or building owner, then the CLEC and ILEC are in exactly the same position and there is no competitive impairment.

[310] Because there is no impairment, there is no basis for the Commission to entertain arguments to further unbundle the loop and require ILECs to construct and modify loops by adding electronics for the CLECs' use. In addition, as we explained in our opening comments (at 62-64), the Commission cannot lawfully require ILECs to add capacity or circuits where they do not currently exist, as requested by NewSouth (at 31-37). As the Eighth Circuit has made clear, "subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's *existing* network," and, while ILECs can be required to "include modifications" to their facilities "to the extent necessary to accommodate interconnection or access to network elements," they cannot be required "to alter substantially their networks in order to provide superior quality interconnection and unbundled access." *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 813 n.33 (8th Cir. 1997), *aff'd in part and remanded in part, AT&T v. Iowa Util. Bd.*, 525 U.S. 366 (1999). The

VIII. TRADITIONAL SWITCHED SERVICES

The traditional switched services market includes POTS offerings to residential and business customers as well as inter-modal equivalents such as cable telephony and wireless services. The relevant UNEs accordingly are circuit switching (and the UNE-P combination), non-high capacity loops, and databases and signaling.

In the business market segment, CLECs have been quite successful, capturing from 20 to 30 percent of the market (and more in many locations) using at least their own switches, and in many cases their own loops as well. There has been virtually no use of the UNE-P in the business market, and the record shows that CLECs are competing successfully using their own switches even for single-line business customers.

In the residential market segment, the primary (though by no means exclusive) sources of competition have been cable telephony and wireless services – entities that are competing successfully without using any unbundled elements. In addition, numerous CLECs are competing in this market segment using their own switches, and in a variety of circumstances their own loops as well.

Against this background, the Commission cannot find impairment without access to unbundled circuit switching and the UNE-P combination in either the business or the residential sub-market. Moreover, contrary to the CLECs' claims, UNE-P is not being used as a transition to facilities-based competition. In fact, there is an inverse correlation between UNE-P usage and levels of facilities investment. For non-high capacity loops, there should be no unbundling in markets where both cable telephony and digital CMRS are available. In addition, there should

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(Continued . . .)
Eighth Circuit re-affirmed this holding on remand from the Supreme Court. *Iowa Util. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000).

be no unbundling of loops serving multiple dwelling units or new developments, because CLECs and ILECs compete on equal footing in those circumstances. Signaling and database access should not be unbundled because requesting carriers have a multitude of competitive alternatives to the ILECs' network, as even AT&T and Sprint acknowledge. Finally, there is no justification for re-imposing unbundling obligations on operator services and directory assistance.

A. Circuit-switched services.

CLECs are using some 1300 competitive circuit switches to provide service to between 16 and 23 million local lines, including three million residential lines, in wire centers containing approximately 86 percent of the BOCs' access lines.[311] Competition for circuit-switched services also comes from the more than 1700 packet switches owned by CLECs, which displace dial-up traffic and are being used for voice as well as data; from cable telephony, which has already captured almost two million access lines; from wireless services, which have drained billions of minutes from the wireline network and, increasingly, are taking secondary and even primary lines as well; and from PBXs, which many business customers use to perform their own local switching.[312]

Notably, the CLECs make no effort to claim that they need unbundled switching as a separate element, and any such claim would be patently indefensible given the tremendous deployment of alternative switching facilities. Rather, they focus on switching only in combination with unbundled loops and shared transport – that is, as part of the UNE Platform. In particular, they contend that they cannot compete effectively in the mass market – a term they use to describe both residential customers and business customers with voice grade (as opposed

311 2002 Fact Report II-1.

312 *See generally* 2002 Fact Report II.

to DS-1) access – without using the UNE-P.[313] They argue that the complexity of hot cuts, the cost and delay of collocation, and the prevalence of DLC-served loops preclude a UNE-L based mass market strategy.[314] And, crossing the line between advocacy and brinksmanship, WorldCom has gone so far as to announce a sweeping UNE-P based initiative called "MCI Neighborhood" in an admitted attempt to "make[] it very hard for federal regulators to pull the rug from under us" by discontinuing the UNE-P.[315]

There is no basis for any of these assertions. Given the evident ease of deployment of alternative switching capabilities, the Commission can confidently ignore the CLECs' scare tactics and eliminate unbundled switching, and hence the UNE-P combination, for both business and residential services throughout the country. Not only can CLECs compete in providing switched services to both business and residential customers without UNE-P, but as the Ohio PUC cautions, UNE-P "should not be significantly relied upon to achieve sustainable competition ... because … it is not a viable long-term solution for facilities-based local competition."[316]

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313 *See, e.g.*, ASCENT at 14-15; AT&T at 203-237; Z-Tel at 27-80; UNE Platform Coalition at 42-47; WorldCom at 25-35.

314 CLECs also assert that UNE-P enables them to build up a customer base that can then be transitioned to their own switches where justified. As explained in section III.B, *supra*, UNE-P has not been used in this manner. The major UNE-P CLECs (AT&T and WorldCom) have no apparent intent of ever migrating their mass market customers to their own switches.

315 *MCI Group Hopes 'Neighborhood' Flat-Rate Offer Bolsters Future of FCC's UNE-P Requirement*, Telecommunications Reports, April 22, 2002, at 5 ("MCI 'Neighborhood' Announcement") (quoting Donna Sorgi, WorldCom's Vice-President – Federal Advocacy). Notably, WorldCom CEO John Sidgmore has said that the largest component of the costs of providing local service "isn't the network cost. It's sales and marketing cost, customer service and overhead cost." Reinhardt Krause, *Sidgmore Shares WorldCom Comeback Plan*, Investors Business Daily, May 6, 2002, at A8. Such costs, of course, are faced by ILECs and CLECs alike and thus cannot give rise to impairment (and cannot be reduced through the use of UNEs in any event).

316 Ohio PUC at 6.

1. There is no plausible basis for finding impairment without access to UNE-P in the provision of switched services to business customers.

The record makes clear that CLECs are competing successfully in providing switched services to business customers without using either unbundled switching or the UNE-P combination. We have uncovered no instance where a CLEC is using standalone unbundled switching to serve these customers, and no CLEC has suggested a need to do so. Moreover, CLECs only infrequently make use of UNE-P to serve their business customers; fewer than 10 percent of all CLEC business lines are provisioned in this manner.[317]

Not surprisingly, the record confirms that CLECs routinely compete in serving even the smallest business customers without using UNE-P. Allegiance, for example, reports that 90 percent of its customers have fewer than 20 lines and that it serves 90 percent of its customers using its own switches.[318] Conversent also documents successfully serving small business customers without using the UNE-P:

> Conversent currently provides local and long distance voice and data services to small and medium sized business customers in second and third tier urban and suburban markets …. The average Conversent customer has approximately 7 lines, and many Conversent customers have only a single business line.[319]

Not only are traditional CLECs providing switched service to business customers without using UNE-P, but inter-modal competitors are beginning to enter this market as well, contrary to the claims of various CLECs.[320] As Strategic Policy Research has explained, "five large cable companies (or their affiliates), including Cox and Time Warner, were providing business

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317 UNE-P and Investment at 3.

318 Allegiance Telecom Inc., SEC Form 10-K for year ending December 31, 2001, at 30, 34.

319 Conversent at 1-2.

320 *See, e.g.*, WorldCom HAI Report at 37; Sprint at 12.

telephony service in over 100 markets as of July 2001."[321] Likewise, a recent Yankee Group report indicates that six of the seven largest cable system operators already offer broadband Internet access to small businesses and that the number of small businesses served over cable's hybrid fiber/coax infrastructure is expected to increase from 522,000 in 2001 to over 1.2 million in 2006.[322] An estimated 70 percent of small and medium-sized businesses in the United States are on or near cable plant that has been upgraded to a hybrid fiber-coaxial architecture.[323] Indeed, even the HAI Report effectively concedes that cable telephony is suitable for non-high capacity business service by focusing its criticism on the supposed unsuitability of cable for DS-1 and higher-grade service.[324] Even if this were true, however – and it is not[325] – as discussed above, there are already substantial intra-modal alternatives for high-capacity business lines. Finally, as detailed with respect to residential switched services, wireless offerings increasingly are taking both minutes and lines away from the wireline telephone network, and the same holds true for business services. Consequently, unbundled switching and UNE-P must be de-listed nationwide for the provision of business switched services.

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321 J. Haring and H. Shooshan, *Reorienting Regulation: Toward a More Facilities-Friendly Local Competition Policy,* Strategic Policy Research April 3, 2002, at 17 (Attachment A to Qwest).

322 *See* Reply Comments of Verizon, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* CC Docket No. 01-337, at 21 (filed April 22, 2002).

323 Dev Gupta, "Is Cable Able? Can SMBs Access Commercial-Grade IP Services Over Cable?", Internet Telephony April 2002, ("*Is Cable Able*?") http://www.tmcnet.com/it/0402/0402fna.html.

324 WorldCom HAI Report at 35-36.

325 *See Is Cable Able*? (explaining that "[o]perators can exploit the spectrum above 860 MHz to deploy switched Ethernet over existing physical connections. They can cost-effectively utilize the higher-frequency spectrum by creating shorter runs and regenerating signals at shorter intervals. … Additional bandwidth beyond 860 MHz can therefore be effectively used for transmitting and receiving high data rate signals while maintaining acceptable signal characteristics."). Of course, cable operators may be reluctant to make the necessary investment to provide such services if high-capacity loop UNEs remain available.

2. Requesting carriers are not impaired in providing residential switched services without the UNE-P combination.

a. The marketplace evidence belies any claim that UNE-P is the only way to serve the mass market.

Several CLECs assert that no competitor – even one with dozens or hundreds of its own switches – can compete against the ILECs to serve mass market customers without access to unbundled switching. To hear them tell it, the technical barriers are too great, the costs are too high, and the returns are too low. As the record reflects, this is nonsense.

First, if mass market competition were impossible without the UNE-P, then CLECs would not have been able to capture roughly *three million* mass market customers using a combination of their own switches and either their own loops or unbundled ILEC loops. In reality, competition for mass market customers is eminently possible without UNE-P – a proposition that such industry giants as AT&T, WorldCom, and Sprint reject out of hand, albeit without confronting the marketplace data.

Second, the Commission need not rely solely on the data in the 2002 Fact Report to conclude that mass market competition can thrive without UNE-P. CLECs themselves provide ample supporting evidence. For example, Conversent's experience, noted above, confirms that the smallest business customers can be served without resorting to UNE-P. The same must hold true for residential customers, because there is no difference between using UNE-L to serve a single-line business customer or a single-line residential customer. Indeed, GCI establishes that this is so: using a UNE-L strategy, GCI "now serves 40% of all business and residential lines in Anchorage," it "began service as a CLEC in Fairbanks … in summer 2001, and already has captured 15% of the market," and it "started service in Juneau … in January 2002, where it

already has 3% of the market."[326] GCI does not use UNE-P at all,[327] although it states (erroneously) that this combination of UNEs is needed in order to serve IDLC-based loops.[328] Similarly, RCN serves the mass market in our region, not just using its own switches, but using its own loops as well.

Third, CLECs claiming impairment without UNE-P essentially ignore inter-modal competition from cable telephony and wireless services. While several CLECs wrongly argue that inter-modal competition is irrelevant to the impairment analysis – a position that the D.C. Circuit just rejected and that we further refute in section IV above – only WorldCom makes a concerted effort to demonstrate that these alternatives are not suitable substitutes for mass market telephone service. Its arguments cannot withstand scrutiny.

For example, WorldCom asserts that cable telephony is not a significant alternative because it has garnered "only" 1.9 million lines, is available to "only" 11.7 million homes, and involves high incremental costs; according to WorldCom, cable telephony will not be more widely available until IP telephony over cable is deployed.[329] WorldCom misses the point. Cable telephony already is available in numerous locations – including, for example, virtually all of Rhode Island, much of eastern Massachusetts, southeastern Virginia, major portions of Louisiana, the Pittsburgh area, Chicago, and northern and southern California – and it is indisputably a potent alternative to the ILEC's circuit-switched services. In these areas, cable

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326 GCI at 3-4.

327 *See GCI Sees UNEs as Vital to Rural Broadband Plan*, Telecommunications Reports, May 6, 2002, at W-5 (quoting Ronald Duncan, the President of GCI, as stating that "GCI is not using UNE-P right now.").

328 GCI at 49-50. Although GCI claims it is impaired without access to the UNE-P in those circumstances, we demonstrate below that the availability of spare copper loops addresses any impairment concerns.

329 WorldCom at 35-37.

telephony has captured one-quarter or more of the potential subscriber base; indeed, AT&T recently boasted that its cable telephony service has "at least a 25 percent share of the market in more than 70 communities."[330] Moreover, the availability and penetration of cable telephony is expected to continue increasing at a rapid rate. Cox and AT&T are signing up new cable telephony customers at a rate of 1.25 million per year,[331] and by 2005, cable companies are expected to have captured some 10 million circuit-switched and 5 million IP-based telephony customers.

Ironically, some CLECs recognize that cable increasingly offers a viable alternative to wireline, but use this burgeoning competition to argue that relying on inter-modal competition as a reason to find non-impairment would produce an ILEC/cable company duopoly.[332] However, the CLECs' scare tactics – warning that a telephone/cable duopoly would inevitably result from discontinuing unbundling obligations where inter-modal competition exists – lack substance. There are platforms other than cable and telephony (such as wireless) for narrowband switched services, and resale will remain available.

WorldCom is likewise off the mark in denigrating the competitive impact of wireless – and, it should certainly know better, since a major reason for the declining fortunes of the long distance carriers is the popularity of wireless "all-distance" calling plans.[333] According to WorldCom, wireless is not a meaningful alternative because only 2.2 percent of subscribers use

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330 Christopher Stern, *Testing the Telecom Giants' Economic Resilience*, Washington Post, April 27, 2002, at E1. This article noted that, "[i]n some areas where Cox is selling [cable telephony] service, it has taken 50 percent of the market from BellSouth."

331 *Cable's Program Extends Beyond TV*, Investors Business Daily, May 16, 2002, at A6 ("Cable's Program").

332 Sprint at 11; SWCTA at 10; WorldCom at 36-37.

333 *See* 2002 Fact Report II-36.

wireless as their only phone, only a small universe of customers would consider doing so, and use of wireless for fixed service requires three times the capacity of typical mobile use.[334] What WorldCom fails to note is that wireless competes for minutes as well as lines, wireless carriers unaffiliated with the RBOCs have deployed more than 950 circuit switches nationwide,[335] wireless calls already account for 12 percent of all U.S. phone calls,[336] and some 18 percent of all cell phone users consider their cell phone their primary phone.[337] Moreover, the Commission has found that "[a]n increasing number of mobile wireless carriers offer service plans designed to compete directly with wireline telephone service"[338] and has noted studies showing that 11 percent of subscribers use their wireless phones to replace "a significant percentage" of their landline use.[339] Indeed, CMRS providers themselves – which, unlike WorldCom, actually own wireless facilities and should therefore understand the capabilities of their networks – have stated that they expect the percentage of customers who abandon wireline phones to rise to "11 percent by 2006, and to a strong, and perhaps overwhelming, majority share by 2012."[340]

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334 WorldCom at 37-38.

335 2002 Fact Report II-34. For this reason, the Commission should not disregard wireless competition, as urged by the Indiana URC. *See* IURC 7-8 (stating that claims of inter-modal competition should be scrutinized to remove competition from affiliated companies).

336 2002 Fact Report II-35.

337 2002 Fact Report II-37.

338 *Seventh CMRS Competition Report*, at 33.

339 *Id.* at 32; *see also* M. Kessler, *18% See Cell Phones as Their Main Phones*, USA Today Feb. 1, 2002, at B1 (noting that a recent *USA Today*/CNN/Gallup poll found that 18 percent of cell phone users "use cell phones as their primary phones.").

340 Reply Comments of VoiceStream Wireless Corporation, *Performance Measurements and Standards for Special Access Services et al.*, CC Docket No. 01-321, at 18 (filed Feb. 12, 2002). In a December 2001 report, IDC found that 10 million wireline access lines will have been displaced by wireless by the end of that year and that, by 2005, wireless phones will replace 30 to 35 percent of second and additional phone lines. 2002 Fact Report IV-12.

This marketplace evidence is far more credible than the dire warnings of carriers that have elected to continue riding on the ILECs' networks rather than risking their own capital. Because the mass market is being served without the use of UNE-P, requesting carriers are not impaired without access to unbundled switching and the platform combination.

b. The CLECs improperly dismiss the availability of resale as a substitute for UNE-P.

The availability of resale eliminates any legitimate concern that competitors in the provision of narrowband switched services might be impaired without UNE-P. After all, the UNE-P combination is nothing more than resold local exchange service at a deeper discount. WorldCom nonetheless argues that resale is not a substitute for UNE-P because it is not economically viable.[341] In reality, if WorldCom cannot compete via resale, it is likely because its performance of retail functions is inefficient.[342] In such circumstances, WorldCom is not competitively impaired, because ILECs must incur the same types of costs in providing their retail services.

Notably, resale permits the same type of marketing activities as CLECs pursue using UNE-P. Indeed, AT&T concedes that UNE-P does not allow it to differentiate its service in the ways that use of its own switch would allow.[343] This is true because UNE-P is nothing more

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341 WorldCom at 49.

342 As the Commission just noted in the *New Jersey 271 Order*: "Although WorldCom alleges that it needs at least $10.00 per line to cover its internal costs, we are concerned here not with WorldCom's own particular profit margin requirements, but with sufficient profit for an efficient competitor." *Application by Verizon New Jersey Inc., et al. for Authorization To Provide In-Region InterLATA Services in New Jersey*, WC Docket No. 02-67, ¶ 172 (rel. June 24, 2002) ("New Jersey 271 Order").

343 AT&T at 228. AT&T goes on to suggest that it may some day roll out a "Multi-Service Platform" based on the UNE-P, which might at some even later date enable it to migrate mass market customers to its own switches. Clearly, AT&T has no firm plans in this regard and is offering this speculative prospect as a means of suggesting that UNE-P can produce value-added competition. The Commission can give no credibility to such unsupported and contingent plans.

than resale, albeit on terms that AT&T finds more economically attractive. The supposed value that AT&T adds in providing service over UNE-P – a price freeze on local calling[344] and unspecified "innovative and pro-competitive service packages"[345] – could just as easily be provided via resale. While such packages may provide marginal benefits to consumers, those benefits are outweighed by the preclusive effect on facilities-based competition.

c. Hot cuts, collocation, and NGDLC loops present no barrier to UNE-L residential competition.

As Chairman Powell has explained, any concerns regarding such matters as collocation and hot cuts could be (and since have been) dealt with directly, and do *not* constitute a basis for imposing an unbundling requirement.[346] Accordingly, the CLECs' arguments as to these matters (and the existence of next generation digital loop carrier ("NGDLC") facilities as well) are not well-taken. Moreover, the CLECs miss a key marketplace fact: the principal sources of competition in the mass market are the cable companies and wireless providers, for whom any issues associated with hot cuts, collocation, and NGDLC loops are irrelevant. Accordingly, as a legal matter, there is no basis for finding impairment based on these arguments; we further demonstrate below that they lack any factual basis in any event.

(1) Hot cuts

According to AT&T, the coordinated hot-cut process, which is used to transfer loops from an ILEC's switch to a CLEC's switch, is inherently unreliable and leads to an unacceptable

344 *Id.* at 226.

345 *Id.* at 228.

346 *UNE Remand Order*, Statement of Commissioner Powell, dissenting in part. ("I am troubled by the extent to which we are importing into the impairment analysis collocation and other problems that do not result directly from denying CLECs access to UNEs.").

level of delays and outages.[347] Before explaining why AT&T is wrong, it is worth noting that Verizon's current hot cut performance is more than sufficient to support competitive entry using UNE loops. The level of our performance is particularly telling because the procedures governing coordinated hot cuts are more complex than necessary, typically at the insistence of the long distance carriers in the collaborative proceedings in which those procedures were designed. Specifically, the coordinated hot cut process requires a cutover within a narrow window and includes various check points during the process to provide verification of activities. There is no reason that loop cutovers could not be handled in a less intrusive manner. For example, cuts could be performed at times, such as late at night, when close coordination is not required. Similarly, problems occurring during the cut over could be handled on an exception basis rather than on a step-by-step, coordinated basis, which is time-consuming and often requires repetitive activities.[348]

In any event, the ILECs' hot cut performance has been attacked repeatedly in 271 filings, and in every instance the Commission has rejected those attacks, finding that the ILECs provide a meaningful opportunity to compete.[349] Verizon has been running cross-connects and wires for

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[347] AT&T at 214-15 (noting that, even when an RBOC meets Section 271 performance standards, 1 in 10 hot cuts may be delayed and 1 in 20 may result in outages); *see also* Z-Tel at 34-47.

[348] Notably, CLECs have provided no evidence that their performance in handling the cutover process comes anywhere near the level of performance achieved by Verizon. For example, CLECs often fail to initiate dial tone at the collocation arrangement.

[349] *See, e.g.*, Application of Verizon New England Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts, 16 FCC Rcd 8988, ¶¶ 158-60 (2001) ("Massachusetts 271 Order"); Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act, 16 FCC Rcd 14147, ¶ 13 (2001) ("Connecticut 271 Order"); Application of Verizon Pennsylvania, et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania, 16 FCC Rcd 17419 ¶ 86 (2001) ("Pennsylvania 271 Order"); Application of Verizon New England Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Rhode Island, FCC 02-63, CC Docket No. 01-324, ¶ 83 (rel. Feb. 22, 2002) ("Rhode Island 271 Order"); Application by Verizon New England Inc. et al, for Authorization to Provide In-Region, InterLATA Services In Maine, CC Docket No. 02-61, ¶ 46

more than one hundred years. Verizon does so efficiently and accurately; in any given day thousands of wires are run on our frames. Our performance has remained steadily high as the number of hot cuts has increased, and there is no reason to believe that we will be unable to handle the volumes that the CLECs allegedly will offer in the future. For example, the volume of hot-cut lines for key states in Verizon-East (New York, Massachusetts, Pennsylvania, and New Jersey) has increased year over year since 2000, while our on-time performance has been maintained on average at 98 percent.[350] The Commission should not credit the CLECs' unsupported argument that the ILECs are unable to handle hot cuts, when the evidence definitively demonstrates to the contrary.

The Commission also should recognize that the existing base of UNE-P customers can readily be converted to UNE-L arrangements (although a significant number of these customers may well be converted to resale or some other serving arrangement). Such conversions can be project-managed, with a team of dedicated technicians performing bulk cutovers on a wire-center-by-wire-center basis.[351] AT&T already has acknowledged that, in the business context, "the project-managed migrations that occurred after acquiring an appropriate volume of

(Continued . . .)
(rel. June 19, 2002) ("Maine 271 Order"); New Jersey 271 Order, ¶ 142. Verizon's hot cut process has been ISO 9000 certified. *See also* 2002 Fact Report App. H (reviewing the ILECs' hot cut performance).

350 Between 2000 and 2001, hot cut volumes increased by 14.4 percent in New York, 40 percent in Massachusetts, 26 percent in Pennsylvania, and 148 percent in New Jersey. Although the number of lines that are hot cut varies from month to month, the change in activity does not affect our on-time performance.

351 Project-managed cutovers can be done outside normal operating hours, and any errors can be addressed at the time of cutover. Furthermore, similar dedicated team approaches have been effective during switch replacements, which require the cutover of tens of thousands of customers.

customers via UNE-P have not resulted in significant service outages and other delays."[352] Although AT&T claims – utterly without support – that this same process will not work for residential customers,[353] it is incorrect. The project-managed conversion process is identical for business and residential customers. Because that process works for business customers, as AT&T concedes, it will be just as effective for the mass market. Existing UNE-P arrangements therefore should be discontinued in accordance with a negotiated, project-managed cutover schedule. TELRIC-priced UNE-P would continue to apply to existing, unconverted arrangements in the interim.

Finally, using hot cuts and a UNE-L strategy to serve mass market customers is not cost-prohibitive. Charges for hot cuts must be TELRIC-based, and AT&T and others routinely fight to assure that these charges are set at a level they deem tolerable (even where the resulting rate is far below even TELRIC). Moreover, hot cut charges get recovered from customers over a period of time, much as Verizon has to recover loop costs over a period of time. CLECs still have a major advantage because they do not have to pay for the loop up front, as we do. Nor are back-haul costs associated with transporting traffic from a collocation cage to a CLEC's switch significant. If they were, switch-based CLECs could not be serving three million mass market customers today. Such backhaul arrangements can be purchased from the ILECs' special access tariffs (at competitively disciplined rates), obtained from a wholesale transport provider, or self-deployed by the CLEC. No party has offered any analysis suggesting that backhaul costs, either alone or in combination with other expenses, preclude UNE-L based mass market competition.

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352 AT&T at 208, 221 (acknowledging that non-DLC, UNE-P loops can be cut over on a project-managed basis with an outage rate of less than one percent).

353 *See Ex Parte* Letter from Leonard J. Cali, AT&T, to Marlene Dortch, FCC, CC Docket Nos. 96-98, 98-147, 01-321, 01-318 (filed April 19, 2002).

For its part, AT&T only contends that its backhaul costs are 100 dollars per line and that ILECs need not incur these costs.[354] There are three responses to this argument. First, it defies belief that AT&T's backhaul costs could be that high. Second, AT&T ignores the fact that its use of switches to serve broad geographic areas creates efficiencies that the ILECs do not share. If a CLEC can use one switch to serve an area for which the ILECs require five switches, the CLEC can avoid a tremendous amount of up-front investment and ongoing maintenance expense. Those efficiencies can offset any backhaul costs. Third, AT&T already is using switches to serve customers, demonstrating that backhaul costs are not prohibitive. Moreover, backhaul is simply a synonym for additional investment in competitive interoffice transport, which is both consistent with the Act and a necessary cost of market entry – not a disadvantage stemming from any natural monopoly supposedly enjoyed by ILECs in providing mass market services.

For these reasons, the Commission should pay no heed to arguments that UNE-P will remain necessary at least until the ILECs have deployed an electronic loop conversion process. AT&T contends that the technology for such a process already exists and that such a mandate would parallel the obligation imposed on ILECs to implement a software-driven process for supporting long distance equal access.[355] Contrary to AT&T's contention, the technology for such a process (AT&T's version of "true" next generation DLC over fiber feeder and associated ATM modules and voice over ATM gateways) is not currently deployed in Verizon's network, and universal deployment to create an electronic loop provisioning process could easily cost

354 AT&T at 212.

355 *Id.* at 235-37.

hundreds of billions of dollars.[356] Accordingly, AT&T's request is nothing more than an effort to assure that UNE-P remains available in perpetuity.[357]

In addition, AT&T's attempt to cast automatic loop provisioning as a logical follow-on to equal access is inapposite. Equal access required only software upgrades to existing digital switches, while electronic loop provisioning would entail the addition of new technology to each and every loop. The scope of the investment for such an effort would be several orders of magnitude greater than was required to implement equal access.[358] Moreover, AT&T does not bother to note that ILECs were authorized to recover their equal access network reconfiguration costs through charges imposed on IXCs.[359] Presumably, no CLEC would be willing to agree to such a cost recovery scheme for an automatic loop conversion process. AT&T also does not explain how such an obligation could be squared with the Commission's lack of authority to compel ILECs to provide CLECs with access to a superior, as-yet unbuilt network; it cannot.[360]

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[356] In New York alone, just the access piece of AT&T's proposed architecture would cost approximately $ 10 billion based on today's NGDLC cost. Verizon estimates that an additional $ 600 million or more would be needed to roll lines in New York onto NGDLC. Further massive investment would be required to deploy an ATM switch and VoATM gateway in each Class 5 office. The total Verizon-wide impact would be in the multiple hundreds of billions of dollars. Switch-based CLECs would be required to incur additional costs as well, because AT&T's "true" NGDLC is ATM-based, and CLECs using traditional switches would be required to deploy TDM-to-ATM conversion capabilities (*i.e.*, voice over ATM gateways).

[357] AT&T's proposal also is inconsistent with forward-looking technology. It perpetuates a narrowband access network rather than migrating to a network that extends fiber closer to the end user. And, the required addition of ATM switches in each central office slows migration to softswitch technology.

[358] Equal access expenditures were estimated to be approximately $2.6 billion. *See Petitions for Recovery of Equal Access and Network Reconfiguration Costs*, FCC 85-628, 1985 FCC LEXIS 2185, ¶ 25 (1985); *see also MTS and WATS Market Structure; Amendment of Part 69 of the Commission's Rules for Recovery of Equal Access Costs*, 2 FCC Rcd 254, n.7 (1987).

[359] *MTS and WATS Market Structure, Amendment of Part 69 of the Commission's Rules for Recovery of Equal Access Costs*, 4 FCC Rcd 2104 (1989).

[360] *See Iowa Util. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part and remanded in part, AT&T v. Iowa Util. Bd.*. The Eighth Circuit re-affirmed this holding on remand. *Iowa Util. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *rev'd in part on other grounds, Verizon v. FCC*.

Notwithstanding AT&T's protestations, the hot-cut process is being used today to support UNE-L based mass market competition, and it can support such competition in a world without UNE-P. Consequently, the hot-cut process does not impair CLECs and does not provide a justification for retaining unbundled circuit switching and the UNE-P combination.

(2) **Collocation**

AT&T also asserts that it would be impaired without UNE-P because of the costs – supposedly, as much as $ 500 thousand per central office – and the delays inherent in collocation.[361] AT&T goes on to claim that nothing has changed since 1999 and that the Commission must again conclude that collocation is a barrier to competition.[362] These arguments lack any credibility.

AT&T is wrong in suggesting that nothing has changed in the past three years. The number of collocation arrangements has increased almost six-fold, from 4300 to 24,500. Presumably, CLECs now are collocated in almost every office where they wish to serve customers, and there is no obstacle to promptly deploying additional collocation arrangements. Thus, while AT&T may be collocated in only 1000 of the 14,000 ILEC central offices (not counting the substantial additional number of collocation arrangements AT&T acquired from NorthPoint),[363] it undoubtedly is collocated in the offices where demand is most highly concentrated, and where AT&T therefore would naturally focus its marketing efforts. Nationwide, CLECs are collocated in central offices that serve approximately 81 percent of the BOCs' total access lines and 79 percent of their residential access lines.[364]

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361 AT&T at 211, *citing UNE Remand Order*, 3815-16.

362 *Id.*

363 *Id.*

364 2002 Fact Report II-16, Table 10.

Moreover, any concerns regarding collocation already have been directly addressed. The Commission's collocation rules have changed since the UNE Remand record was compiled, in a manner that reduces both the costs and the time required for collocation. For example, the Commission now requires ILECs to permit shared, cageless, and adjacent collocation; it has made the space assignment process flexible; and it has established strict time frames within which collocation requests must be implemented.[365] Notably, AT&T's anecdotal reference to collocation costs of half a million dollars relates to an arrangement that pre-dated the UNE Remand Order, and it is far in excess of typical collocation expenses today.

Finally, AT&T's collocation-related complaints deserve no credence in light of the Commission's repeated affirmation that Verizon's "overall level of on-time performance for completion of physical collocation arrangements satisfies Verizon's Section 271 obligations and allows an efficient competitor a meaningful opportunity to compete."[366] AT&T is grasping at straws. Its overblown rhetoric cannot mask the lack of substance that pervades not just its collocation argument, but its comments as a whole.

(3) **NGDLC loops**

In an effort to persuade the Commission to create yet another UNE platform – this time for broadband – CLECs argue that they require a "unified loop" when customers are served by NGDLC in order to provide both broadband and voice services. For the reasons detailed above

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365 *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order, 14 FCC Rcd 4761 (1999), *aff'd in part and vac'd and remanded in part*, *GTE*, 205 F.3d 416 (D.C. Cir. 2000); *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 00-297 (rel. Aug. 10, 2000); *Collocation Remand Order*.

366 Massachusetts 271 Order, ¶ 195; *see also* Connecticut 271 Order, ¶¶ 45-50; Pennsylvania 271 Order, ¶ 99; Rhode Island 271 Order, ¶ 74.

and in our opening comments, CLECs are not impaired in providing broadband services without access to a unified loop UNE.[367] Nor, as explained below, are they impaired in providing voice service without such a UNE.[368]

First, CLECs can gain access to the voice channel at the central office where voice is provided over the universal DLC portion of the NGDLC architecture. Second, CLECs can obtain spare copper loops where they are available. Contrary to the CLECs' allegations, there are no cost, technical, operational, or other impediments to providing voice service to the customer over the copper loops rather than the NGDLC loop. Even where Verizon may implement NGDLC that supports both voice and data over integrated line cards at remote locations, CLECs still can access the voice channel at their collocation arrangement in the central office.[369] In either case (spare copper loop or UDLC), a CLEC can provide voice service without collocating at the remote terminal, and there are no interference concerns from the presence of fiber in the feeder plant. Consequently, access to a unified loop is not necessary in order for CLECs to provide voice service to NGDLC-served customers.

Finally, adopting a new unified loop UNE just so that CLECs could provide voice services on a platform basis would deter precisely the type of investment that the Act seeks to promote. NGDLC is being deployed in order to bring a wide variety of innovative and more capable voice and data services to as broad a customer base as possible. If ILECs were required

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[367] Ironically, although AT&T claims impairment related to the deployment of NGDLC, its proposal for electronic loop provisioning employs an architecture that would place all loops on NGDLC technology, thereby perpetuating the alleged impairment.

[368] As a threshold matter, there are many areas where CLECs are not impaired without access to loops at all, regardless of the specific loop architecture. *See* section VIII.B.1, below.

[369] Verizon's potential implementation of integrated NGDLC line cards for voice and data at remote locations generally maintains separate voice and data channels between the remote location and the central office, enabling the CLEC to access the voice channel at its collocation arrangement.

to incur the costs of expanding access to such arrangements (as well as to share potential returns that are used to justify the investment in the first place), the net result will be fewer customers having access to advanced services. Such a result would be antithetical to both Congress's and the Commission's core objectives.

d. UNE-P is not a stepping stone to facilities-based residential competition and actually discourages investment by all market players.

As we have just demonstrated, UNE-P is not needed to enable mass market, switched services competition. In this section, we refute claims by AT&T and WorldCom, relying on UNE-P evidence from a limited time period and a few states, that unbundling increases CLEC and ILEC network investment. Proper evaluation of the evidence demonstrates not only that UNE-P is not used as a transition to facilities-based competition, but that UNE-P actually discourages investment by CLECs and ILECs alike.

(1) The data show that the availability of UNEs, and UNE-P in particular, discourages CLEC investment.

Based on anecdotal claims regarding its own investment in New York and California, AT&T asserts that its "own market experience further confirms what Congress and this Commission previously thought would be true: the availability of UNEs promotes – and is a necessary precondition for – investment in facilities-based competition."[370] Contrary to AT&T's claims, the facts confirm, as one would expect, that states with more UNE-P have less facilities-based competition.

AT&T and other CLECs did most of their facilities-based investment in New York prior to the rise of UNE-P usage. AT&T did not begin marketing UNE-P to residential customers until the fall of 1999. At that time, AT&T had installed 15 local exchange circuit switches in

370 AT&T at iii.

New York. By the end of 2000, AT&T had 900,000 residential customers served by UNE-P, but between the fall of 1999 and June 2001, AT&T installed only two additional switches.[371] Similarly, WorldCom deployed eight of its nine switches in New York prior to serving a large volume of UNE-P customers in late 1999. CLECs as a whole in New York deployed most of their switches prior to the rise in use of UNE-P,[372] and the vast majority of new switches since that time have been deployed by non-UNE-P CLECs.[373] This same trend is reflected in facilities-based line growth. Between December 2000 and February 2002, New York CLECs that made substantial use of UNE-P added only about one-third as many facilities-based lines as those CLECs making little use of UNE-P. Moreover, those CLECs not relying on UNE-P added facilities-based lines at approximately four times the rate of CLECs heavily using UNE-P.[374]

AT&T's reliance on California is similarly misplaced. Since the explosion of UNE-P usage in New York, AT&T, WorldCom, and all CLECs together have been deploying more new switches in California than New York. Despite much higher UNE-P volume in New York than in California, total CLEC switch deployment per switched access line is equivalent in the two states and California has higher levels of facilities-based residential lines per switched access line.[375] Moreover, two significant distinctions between the New York and California markets not considered by AT&T likely account for differences in competitive development. First,

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371 UNE-P and Investment at 5. AT&T was able to capture these customers using UNE-P despite its claim that Verizon's UNE rates were "inflated significantly above the cost-based rates that the statute requires." Reply Comments of AT&T Corp. In Opposition to Bell Atlantic's Section 271 Application for New York, Docket No. 99-295 at 40 (filed Nov. 8, 1999).

372 UNE-P and Investment at 5.

373 *Id.*

374 Harold Ware, UNE-P Use and Facilities-Based Competition, in New York and Other States, attached as Appendix 1 to Attachment B herein, ¶ 11 ("Ware").

375 UNE-P and Investment at 6-9.

California has smaller local calling areas than New York and substantially smaller average local retail revenues. This gives competitors greater incentive to enter the New York market because there is more revenue at stake. Second, business customers in New York are concentrated to a much greater extent than in California, making it more costly to enter the California market.[376]

WorldCom makes the same errors as AT&T, relying solely upon data from Georgia and Texas to support its claim that UNE-P does not discourage facilities deployment.[377] However, when total CLEC deployment is considered throughout the United States, it is evident that facilities-based competition within a state decreases as UNE-P penetration increases.[378] Nine states have proportionately more facilities-based lines than New York, and each of these states has lower levels of UNE-P. Only six states, New York included, have a greater penetration of UNE-P lines than facilities-based lines. Moreover, the five states other than New York have proportionately less facilities-based competition than both the average and mean for the continental United States.[379] Thus, consistent with basic economic theory, where CLECs can use low-priced UNEs, they rely on those UNEs rather than deploying their own facilities.

(2) **ILEC investment is not increased by CLEC use of the UNE-P combination.**

AT&T also argues that ILEC investment is highest in states that also have significant UNE-P entry.[380] This is absurd; AT&T's own CEO has explained that "[n]o company will invest billions of dollars to become a facilities-based … provider" if other companies "that have not

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376 Ware, ¶ 36.

377 WorldCom at 88-90.

378 UNE-P and Investment at 11-14.

379 *Id*.

380 AT&T at 66-67, Declaration of Robert D. Willing (April 3, 2002) attached as Attachment F to AT&T ("Willing Decl.").

invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investment and risks of others."[381] As Dr. Kahn warns, "the more liberal th[e] definition [of available UNEs] … the less the incentive for facilities-based entry *and* for creative investment by incumbents and entrants alike."[382] Indeed, Chairman Powell himself has noted that "*unconstrained* access would eviscerate incentives for entrants to install their own facilities and thereby inhibit the type of competition most likely to spur innovation, provide price discipline and otherwise benefit consumers."[383]

In any event, AT&T's methodology is faulty in several critical respects, which are detailed in Appendix Two to the Kahn/Tardiff Reply Declaration.[384] Its results, needless to say, are thus wholly erroneous. For example, AT&T contends that, among the 13 states in which BOCs had been granted Section 271 approval or an application for such approval was pending when the opening comments were filed, the three states with the highest ILEC investment in 1999 and 2000 are also the states with the highest UNE-P entry.[385] However, when the twenty-six states in which UNE-P lines represent ten percent or more of BOC access lines are considered, there is no correlation between UNE-P levels and ILEC investment.[386]

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381 Armstrong 1998 Speech.

382 Declaration of Alfred E. Kahn, ¶ 6 (May 16, 1999) as attached to Comments of Bell Atlantic, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, et al.,* CC Docket No. 96-98 (filed May 16, 1999).

383 Statement of Commissioner Michael K. Powell, CC Docket No. 96-98 (Apr. 16, 1999), at 1 (http://www.fcc.gov/Speeches/Powell/statements/stmlp910.html) ("Powell Apr. 16 Statement").

384 Kahn/Tardiff Reply Decl., ¶¶ 15, 20-42.

385 AT&T at 66-67, Willig Decl.

386 UNE-P and Investment at 12.

AT&T also fails to consider trends in ILEC investment unrelated to UNE-P entry.[387] Thus, while AT&T notes that, in 1999 and 2000, ILEC investment was greater in Georgia (which has high UNE-P entry) than in Massachusetts (which has low UNE-P entry), ILEC investment in Georgia was greater than in Massachusetts in 1996, 1997, and 1998 as well,[388] so AT&T's data do not even show correlation, let alone causation.[389] Moreover, even when the relative change in ILEC investment versus UNE-P entry is considered, there is still no correlation between the volume of UNE-P in a state and the average increase in ILEC investment.[390]

* * *

It is easy for carriers that have no intent of serving mass market customers using their own facilities to claim that the availability of UNE-P does not deter investment. The Commission, however, should consider far more credible the warning of CLECs who have in fact sought to compete in the mass market using their own facilities: a "regulatory regime that fosters the broad availability of incrementally-priced UNEs discourages competing carriers from building their own networks and leaves them dependent over the long term on the ILECs, to the detriment of the public interest."[391] In other words, as Chairman Powell has cautioned,

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387 *Id.* at 11-14. Likewise, AT&T fails to acknowledge that some portion of ILEC investment is triggered by the need to support further unbundling – investment that will most likely be wasted if the CLECs are correct and UNE-P is merely a transitional mechanism.

388 *Id.* at 13.

389 The other comparisons cited by AT&T also reveal the same ILEC investment patterns over time in the years before and after UNE-P entry. *Id.* at 12-14.

390 *Id.* at 13-14.

391 Comments of Cox Communications, Inc. *Implementation of Local Competition Provision in the Telecommunications Act of 1996 et al.*, CC Docket No. 96-98, at 3 (filed May 26, 1999).

"[m]aking … access too easy or attractive will only ensure that the entrant's relationship to the incumbent is characterized more by one-sided dependence than true rivalry."[392]

Moreover, UNE-P does not just deter investment by CLECs (and devalue the investments CLECs already have made in their own switches to serve the mass market); it also deters true facilities-based competition by providers of other platforms, such as cable telephony. If a cable company is considering whether to upgrade its network to offer telephony, there will undoubtedly be cases where a decision to do so would be justifiable in the absence of UNE-P competition but would be uneconomic where a multitude of other providers can enter the market without investing in their own facilities and can price their services at a level that undercuts the incumbent. In such cases, consumers may benefit in the short term from the availability of discounted service, but they will suffer in the long run because facilities-based rivals, who can offer competition across all dimensions (not just price) will fail to emerge.

For this reason alone, the Commission should promptly eliminate UNE-P. The longer it remains in place, and the more customers CLECs serve over it, the more difficult it will be to eliminate – which, of course, is the express goal of WorldCom's recent "Neighborhood" announcement.[393] Rather than allowing this to happen (and replicating the fiasco surrounding reciprocal compensation for Internet-bound traffic) the Commission should de-list circuit-switching and UNE-P.

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392 Powell April 16 Statement at 1.

393 MCI 'Neighborhood' Announcement

B. Other elements relevant to switched services for business and residential customers.

1. Non-high capacity loops

Our comments demonstrate that there is substantial intra- and inter-modal competition for services using non-high capacity loops.[394] CLECs – often affiliated with neighboring independent telephone companies – are overbuilding both business and residential loops in RBOC territories.[395] CLECs also are deploying broadband pipes to MDUs (which house between 30 and 35 percent of the market), over which they have been successfully providing bundled services, including basic voice, to consumers.[396] And, in new subdivisions, CLECs are not competitively impaired because ILECs have no advantage stemming from legacy networks and face powerful competition from entities that are able to offer a full package of voice, video, and data services on an integrated basis, often with a lower cost structure than the ILEC has.[397]

Moreover, there is strong inter-modal competition for services provided over non-high-capacity loops, primarily from cable telephony and wireless services – competition that, as the Commission recognizes and the *USTA* decision confirms, must be considered in evaluating claims of impairment. Cable telephony service is expected to reach half of all homes in the next three years, and in many areas, such as eastern Massachusetts, Rhode Island, Louisiana, Chicago, and northern and southern California, it is already available to the vast majority of homes.[398]

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394 Verizon at 120-28.

395 Verizon at 125; 2002 Fact Report IV-15-18.

396 For example, RCN has built out its network to pass more than 1.5 million homes and added nearly 47,000 new subscribers to its network in the fourth quarter of 2001. 2002 Fact Report IV-15-16.

397 Verizon at 127.

398 *Id.* at 12-13; 2002 Fact Report IV-10; *see also* Press Release, "AT&T Broadband Brings Local Telephone Competition to Grapevine,"

Nor is cable telephony an option only for residential subscribers; increasingly, it is available to business customers as well, as explained above. Notably, cable companies report that cable telephony is experiencing "skyrocketing subscriber rates and revenues…."[399] Analysts predict that circuit-switched cable telephony will capture ten million subscribers by 2005, and that cable IP telephony, which will be introduced shortly, should gain five million subscribers by then.[400] Analysts also report that cable telephony has garnered penetration rates on the order of 30 percent where it is available, and that cable companies upgrade their networks in order to create a "three-trick pony," selling cable telephony in conjunction with digital cable and high-speed Internet access.[401]

Wireless services offer another alternative to ILEC loops,[402] with 18 percent of wireless phone subscribers using their wireless phone as their primary phone and between three and five percent of wireless subscribers having abandoned wireline service entirely.[403] Eighty percent of all subscribers enjoy high-quality digital service, 94 percent of the U.S. population lives in counties served by three or more CMRS providers, and the average price of mobile telephone

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(Continued . . .)
http://biz.yahoo.com/prnews/020620/dath019_1.html (stating that AT&T Broadband's local telephone service is now available in 26 cities in the Dallas/Fort Worth area).

399 Tim Lemke, *Phones: The Next Generation*, The Washington Times, May 13, 2002, at D8. Cable telephony adds some 70,000 new subscribers a month. Verizon at 124; 2002 Fact Report IV-10.

400 Verizon at 124; 2002 Fact Report IV-11.

401 Cable's Program.

402 Verizon at 125; 2002 Fact Report I-4 (citing examples).

403 Verizon at 125-26; 2002 Fact Report IV-13.

service continues to drop, declining between 5.5 and 31 percent in the past year.[404] Not surprisingly, industry analysts estimate that wireless phones have replaced 10 million second phone lines and that, by 2005, wireless phones will replace roughly one-third of all second and additional lines.[405] And wireless companies themselves assert that CMRS service will replace a significant portion, or even a majority, of wireline phone service in the coming years.[406]

In contrast to the voluminous evidence we submitted, the CLECs provide no data regarding the extent to which either self-deployed or other alternatives are available. Rather, as with other elements, they simply assert impairment.[407] In addition, they attempt to downplay the viability of inter-modal competition, without any success.[408] For example, while WorldCom contends that cable telephony is not a significant alternative to wireline phone service, it concedes that, in less than three years, cable telephony already has garnered 1.9 million subscribers, and is available to 11.7 million homes,[409] and that "availability and penetration are much higher in particular cable telephony serving areas."[410] Claims that cable telephony is available only to residential customers are likewise off the mark, as discussed above.[411] In

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404 "FCC Adopts Annual Report on State of Competition in the Wireless Industry," News Release at 1 (June 13, 2002) http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-223382A1.pdf.

405 Verizon at 125; 2002 Fact Report IV-12.

406 Verizon at 14 (citing statements by Leap Wireless and VoiceStream).

407 While some CLECs provide figures about their overall network, none details the type of loops and facilities deployed. Instead, they simply state that their networks consist "largely" of long haul and intercity facilities, not local loop facilities. *See, e.g.*, ALTS at 43-45.

408 ALTS at 45; WorldCom at 35-38; Z-Tel at 68-69.

409 WorldCom at 35-36.

410 WorldCom HAI Report at 24.

411 *See* section VII.A.1, *supra*.

addition, arguments that there are high incremental costs of providing cable telephony are without merit.[412] To the contrary, WorldCom admits that the incremental cost of adding cable telephony is only around $ 500 per line,[413] which is lower than our very conservative estimate of $ 800 to $ 825 per line[414] – and the rapid spread of cable telephony makes it plain that, whatever the incremental costs may be, they are not an obstacle to widespread deployment of this alternative communications service. Moreover, IP telephony over cable will cut per-home costs by $ 200 or more, making the service even more economical to deploy.[415]

Similarly, the CLECs' attack on wireless service as a viable inter-modal alternative is unavailing. Indeed, CLECs concede that some consumers are using their wireless phone as their only phone.[416] Nor is there any merit to WorldCom's argument that wireless service quality is "notoriously poor" or that wireless networks lack coverage.[417] Wireless service quality is now competitive with wireline – in almost all major markets, wireless carriers offer digital calls with connection quality comparable to the quality of wireline services.[418] In addition, wireless carriers offer national coverage and provide ubiquitous alternatives to wireline phones.

In sum, the marketplace evidence demonstrates that a narrowing of the obligation to provide unbundled non-high capacity loops is warranted. In particular, the Commission should:

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412 WorldCom at 35-36.

413 WorldCom HAI Report at 27.

414 2002 Fact Report IV-10.

415 Cable's Program.

416 WorldCom at 37-38. WorldCom makes a futile attempt to decrease the significance of its admission by explaining that those who use wireless phones as their only phone are "young singles." However, this is the very demographic that marketers try to reach. Also, these early adopters represent the future trend of increased exclusive use of wireless phones.

417 WorldCom HAI Report at 40-41.

418 2002 Fact Report IV-13.

- Eliminate the unbundling obligation where both cable telephony and digital CMRS service are available.

- Presume that CLECs are not impaired in their ability to provision loops to MDUs without access to unbundled loops, in the absence of a compelling showing to the contrary in particular circumstances (which, thus far, no CLEC has even attempted to make).

- Decline to mandate unbundling of loops used to serve new developments.

- Carefully examine the record of deployment of non high-capacity loops in other settings in order to determine, after considering the types and locations of customers served by non-ILEC loops and the practicality of additional deployment of loop alternatives, whether there are additional circumstances under which the unbundling obligation should be eliminated today.

The remaining unbundling requirement for non-high-capacity loops should expire no later than three years after the effective date of the Commission's order in this proceeding. Given the strong existing competition from wireless and cable telephony and the tremendous expected growth of these alternatives over the next several years, the Commission can confidently conclude that any impairment with respect to non-high-capacity loops will have been alleviated by the sunset date.

2. Signaling and access to call-related databases

The widespread deployment of alternative signaling networks and databases precludes any finding of impairment.[419] Several CLECs confirm that there are multiple alternative

[419] Verizon at 129-136. As we explain in our comments, the Commission should not mistake the need to *interconnect* the signaling network of a switch-based CLEC or alternative signaling vendor with Verizon's signaling network with the desire of some CLECs to *use* an ILEC's signaling as a UNE, as some commenters suggest. *See* ALTS at 88-90. Interconnection of signaling networks should be and is governed by tariffs and interconnection agreements, at prices that need not be based on TELRIC. Verizon interconnects its signaling network with numerous alternative providers, including Illuminet, SNET, AT&T, WorldCom, and TSI. *See* Verizon at 130, n.459.

providers of these elements.[420] Non-ILEC vendors include Sprint, AT&T, WorldCom, TSI, Illuminet, ICG Communications, and TARGUSinfo,[421] which have achieved "state of the art" nationwide connectivity and offer their customers diversity, reliability and redundancy, as well as the economies of scale and scope of the ILECs.[422] CLECs also agree that these alternative providers are widely connected to LATAs, have thousands of access links, signaling points, and several mated pairs of signal transfer points (STPs),[423] and, as a result, offer competitive alternatives to the ILECs' network elements.

Some CLECs nonetheless allege that they would be impaired without access to unbundled signaling or call-related databases. Their claims of impairment are based on (1) the need to use unbundled signaling and access to ILEC databases in conjunction with unbundled switching,[424] and (2) unfounded allegations that alternative sources of signaling and call-related databases are of inferior quality.[425] Neither argument has merit.

First, as we already explained, switching should not be unbundled. Without unbundled switching, the CLECs' claimed rationale for impairment ceases to exist. Indeed, even AT&T concedes that "there is no apparent need for CLECs to be able to access unbundled signaling

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420 Sprint at 50-51; Direct Testimony of Paul Florack (Dec. 19, 2001) as attached to Eschelon ("Florack Testimony"); Allegiance at 31 (there are at least 5 alternative providers); AT&T at 240 n.231 (there are several regional and nationwide alternative providers).

421 TARGUSinfo only provides access to call-related databases. Verizon at 133-34.

422 *See e.g.*, Allegiance Telecom at 31; Eschelon at 34-35; Florack Testimony at 4, 7; Sprint at 50-51; Illuminet at 3-7.

423 *See* Allegiance Telecom at 31; Illuminet at 5; Eschelon at 34-35; Florack Testimony at 4; Sprint at 50-51.

424 WorldCom at 122-23; *see generally* Declaration of Bernard Ku (April 2, 2001) attached as Attachment E to WorldCom ("Ku Decl."); AT&T at 239-240.

425 Allegiance at 31-36; ALTS at 88-89; CLEC Coalition at 105-109; WorldCom at 123; Ku Decl. at ¶ 8.

when they do not use ILEC switching. Such signaling is available from other suppliers on a regional (if not national) basis."[426]

Second, non-ILEC providers are just as reliable as the ILECs.[427] CLECs' claims to the contrary rest almost entirely on an outage of one alternative provider that occurred more than two years ago. In reality, as Sprint and Eschelon confirm, CLECs can choose among a half-dozen alternative providers that offer "state-of-the art" networks with redundancy, quality, reliability and ubiquitous coverage.[428] Those networks are highly reliable. For example, Illuminet emphasizes that it "monitors network performance around the clock to protect against outages and maintain network integrity," and its "state-of-the-art, network-wide troubleshooting and monitoring system provides advanced warning in the case of potential problems."[429] Other alternative providers assert that they have similar procedures to monitor and protect against outages.[430]

CLECs err in arguing that an STP is necessary in every LATA in order to maximize reliability. Since the last UNE Review, some BOCs have reduced the number of STPs up to 50 percent in order to reduce costs.[431] As a result, they no longer have STPs in every LATA.[432] Even so, no CLEC alleges that the ILECs' signaling networks are unreliable.

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426 AT&T at 240, n.231.

427 *See* CLEC Coalition at 105-109, Allegiance at 33-34.

428 Sprint at 50; *see also* Verizon at 129-136.

429 www.illuminet.com/products/lec/networks.html. Illuminet's extensive procedures likely account for the fact that, based on the record evidence, Illuminet has not had a major outage in two years.

430 Verizon at 134-36.

431 *See e.g.*, BellSouth at 103. Verizon has not reduced its STPs as much as BellSouth has, but we have eliminated some STPs and further reductions are planned.

432 *See e.g.*, BellSouth at 103, 106-107.

Finally, WorldCom claims that access to CNAM via batch download is critical and claims impairment because ILECs are the "sole providers" of CNAM database information for the "vast majority of local customers."[433] To the contrary, access to the ILECs' CNAM database may be obtained through third parties rather than as a UNE, and there are alternative CNAM databases as well.[434] Once again, lack of access to an element does not "impair" WorldCom (or any other requesting carrier) simply because it might involve *some* additional cost compared to TELRIC pricing. There is a competitive market for signaling and access to databases, and WorldCom, like other competitors, should pay market-determined rates for those functionalities.

3. Operator services and directory assistance

Even though competition has been thriving without access to unbundled operator services and DA databases, a few CLECs urge the Commission to resurrect these UNEs, rehashing arguments that the Commission has squarely rejected.[435] In particular, these CLECs assert that third-party OS/DA alternatives are "inferior" because the listings are not updated as frequently as the ILECs' listings and ILECs are charging above-cost rates for access to OS/DA.[436] As a result, ALTS and the UNE Platform Coalition contend that all OS/DA services should be unbundled,[437]

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433 WorldCom at 124; Declaration of John Gallant and Michael Lehmkuhl ¶ 3 (Apr. 2, 2002) attached as Attachment F to WorldCom ("Gallant/Lehmkuhl Decl.").

434 Verizon at 134-35. Verizon also offers several parties CNAM database capabilities under commercial contract. *Id*. at 140, n.498.

435 *See UNE Remand Order*, 3899-900 (the Commission was "not persuaded" by the CLECs' arguments that OS/DA should be unbundled).

436 WorldCom at 127-29; Gallant/Lehmkuhl Decl., ¶¶ 4-7; ALTS at 91-93; UNE Platform Coalition at 55-59.

437 ALTS at 91-93; UNE Platform Coalition at 55-59.

while WorldCom recommends that only DA databases (as opposed to DA services) be unbundled.[438]

There is no basis for taking such a regressive step. As the Commission found in the UNE Remand Order, there are readily available alternatives that are being used by hundreds of CLECs.[439] Further, and contrary to the CLECs' arguments, these alternatives are not inferior. Rather, alternative OS/DA are "sufficiently equivalent to that of the incumbent's services."[440] The commenters fail to proffer any data or detail any change in circumstances that would warrant revisiting these findings, and likewise fail to explain how they could possibly be impaired, given that they have been competing without unbundled OS/DA since the UNE Remand Order.

What is more, even though OS/DA is not a UNE, Section 251(b)(3) requires that ILECs provide requesting carriers nondiscriminatory access to the ILECs' OS/DA services and databases.[441] The Commission's rules implementing Section 251(b)(3) mandate that the quality of such services be equal to that of the ILECs, and that ILECs provide requesting carriers with updates to DA database listings within the same time intervals that the ILECs update their own

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438 WorldCom at 127-28.

439 *UNE Remand Order*, 3894-95, 3904.

440 *UNE Remand Order*, 3898 ("We find that the functionality of third-party supplied OS/DA is sufficiently equivalent to that of the incumbent's services such that a requesting carrier's ability to provide the services it seeks to offer is not impaired without access to the incumbent's OS/DA service."). The Commission further found that "these alternative sources of OS/DA are available as a practical, economic and operational matter." *Id.*, 3903.

441 As the Commission found in the *UNE Remand Order*, "the ability [of requesting carriers] to obtain nondiscriminatory access to operator services and directory assistance under section 251(b)(3) significantly mitigates any potential impairment a requesting carrier may experience if denied access to the incumbent's OS/DA service as an unbundled network element." *UNE Remand Order*, 3903.

databases.[442] Consequently, claims that alternative providers' listings are not as accurate as the ILECs' are unfounded, and there is no basis upon which the Commission could conclude that CLECs are impaired without unbundled access to the ILECs' OS/DA services or databases.

Finally, this proceeding is not the proper forum for CLECs to attack the ILECs' rates for OS/DA services. As the Commission found in the Directory Listing Information Report and Order, if requesting carriers believe that an ILEC's rate for OS/DA services ordered pursuant to Section 251(b)(3) is unreasonable, they can file a Section 208 complaint or pursue the matter before the appropriate state commission.[443] The Commission should affirm its finding that CLECs are not impaired without access to OS/DA as a UNE.

IX. THE ECONOMIC TROUBLES AFFECTING THE TELECOMMUNICATIONS INDUSTRY REINFORCE THE NEED TO LIMIT UNBUNDLING.

Notwithstanding the overwhelming evidence that CLECs are competing successfully without UNEs for a wide variety of services in a multitude of locations, several CLECs assert that unbundling requirements are more important than ever because of the spate of telecommunications bankruptcies and the tight capital markets.[444] They have it precisely backwards: the downturn in the industry has been due in part to the easy-entry policy adopted following passage of the 1996 Act, and the best means of speeding the industry's recovery is to limit unbundling as Congress intended, and thereby reward investment and innovation. As Drs. Kahn and Tardiff note, "if the experience with the development of competition for local

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442 47 C.F.R. § 51.217(c)(3) ("Updates to the directory assistance database … shall be performed in a timely manner, taking no longer than those made to the providing LEC's own database.").

443 *See Provision of Directory Listing Information under the Telecommunications Act of 1934*, First Report and Order, 16 FCC Rcd 2736, 2752 (2001) (an unreasonable rate for DA services would violate Section 201(b)).

444 *See, e.g.*, CompTel at 65-71; Covad at 15-20; Eschelon at 15; CLEC Coalition at 13-14; Dark Fiber Commenters at 7-8; Progress Telecom at 14.

telephone services in the period since the Commission's last UNE appraisal justifies any change in its prescriptions with respect to the identification and pricing of UNEs, it justifies reducing, rather than expanding, the encouragement they provide entrants to enter these markets using facilities of the incumbents rather than their own."[445]

A. Tying regulatory policy to transient changes in the economy would weaken competition and harm consumers.

Shake-outs in any industry – and particularly in an emerging industry – are a fact of life.[446] The shake-out in the telecommunications industry has been particularly significant because of a combination of regulatory policies that favored rapid entry over sustainable, long-term competition, and the indiscriminate availability of capital. Continuing to make UNEs available in order to keep as many competitors in the marketplace as possible would perpetuate these errors and destroy economically genuine competition – propping up competitors that, sooner or later, will fail in any event and thus weakening competitors (both new entrants and ILECs) that can be effective rivals over the long run.[447] While rapid entry of multiple competitors may be typical (and even desired) in markets that are newly opened to competition, no market can support unlimited entry in the longer term. Where competition has begun to mature, as in the local exchange market, consumers will reap maximum benefits from the

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445 Kahn/Tardiff Reply Decl., ¶ 14.

446 *See Id.*, ¶ 8 ("Professor Willig is of course factually correct in pointing out that the market value of publicly-traded CLECs has plummeted. Regarded in the context of contemporaneous events in similar parts of the economy as well as the historical lessons from other industries, however, the long-term economic significance that he places on these cyclical developments is much greater than they deserve.").

447 *See* Shelanski Reply Decl., ¶ 29 ("The Commission should not interfere with natural shakeout that market changes bring by using unbundling to provide a safety net for firms whose business plans proved weak or who simply have not proven sufficiently efficient and competitive to survive changes in the economic cycle. Using UNE policy to preserve firms that have not proven viable will harm those competitors that are surviving the changing economic cycle for telecommunications and reward and perpetuate the inefficiency of those firms that otherwise would have left the market.").

emergence and survival of several facilities-based competitors. Giving life support to additional, non-facilities-based entrants simply to maximize the number of competitors advances the interests of individual companies at the expense of competition.

Requiring ILECs to buffer competitors against the effects of business cycles would further undermine competition because ILECs cannot rationally plan for investment based on predictions of future changes in the economy. If unbundling obligations waxed and waned in counterpoint to the economy, ILECs would have to expand capacity to accommodate increased unbundling during bad times, but likely would find that demand failed to materialize because the economy had improved by the time the capacity was in place. The Commission, therefore, should not place additional burdens "on ILECs during a period of economic vulnerability in order to prop up firms that have not proven viable."[448]

Finally, basing unbundling policies on the state of the economy is irrational because the effects of a downturn are neither unidirectional nor equal for all types of entrants. Economic downturns create both challenges and opportunities. While the availability of capital is constrained, the costs of other key inputs to building a telecommunications business – such as equipment and labor – are much lower than they would be in boom times. Manufacturers have excess inventories, and thousands of qualified employees have been laid off.

B. The CLECs have failed to show that the current economic situation has produced impairment.

In any event, the CLECs have failed to demonstrate that the economic downturn has produced impairment. As an initial matter, the telecommunications downturn is affecting ILECs as well as CLECs; it confers no differential advantage on ILECs and thus does not engender

448 *See Id.*, ¶ 28.

competitively meaningful impairment.[449] Just in the first quarter of this year, Verizon's lines decreased by 2.7 percent, SBC's lines by 3.6 percent, and BellSouth's lines by 1.8 percent.[450] (In contrast, CLECs increased their lines by 4.9 percent during the same time period.[451]) And, while CLECs are cutting back investment, ILECs are doing the same.[452]

Moreover, the economic situation, while undeniably bad, has not prevented the CLECs from continuing to gain market share. Notwithstanding the relatively limited availability of capital, CLECs continue to grow. As ALTS just stated:

> [T]he most remarkable feature of the CLEC industry in 2001 was this – it continued to grow! CLECs' market share expanded from 8.5% to 9.9% measured in access lines, and from 9.0% to 10.7% measured in local revenues. Although CLEC investment in 2001 could not keep pace with the torrid investment levels in 2000, CLECs still managed an additional $12.3 billion in capital expenditures in 2001, bringing the total CLEC industry investment to a whopping *$65 billion* in the six years since passage of the 1996 Act.[453]

Put another way, "the CLECs have shown tremendous resilience and staying power, in spite of the market turmoil."[454]

In addition, many CLECs are emerging from bankruptcy debt-free and more focused. In fact, "several companies have made the adjustments without seeking Chapter 11 protection, such

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449 *Id.*.

450 Christopher Stern, *Testing the Telecom Giants' Economic Resilience*, Washington Post, April 27, 2002, at E1.

451 *Survey Shows CLECs Increased Local Lines 4.9% in 1st Quarter*, Telecommunications Reports, July 8, 2002, at 9 (noting, *inter alia*, that AT&T Broadband increased its lines by 11.1 percent and Cox increased its lines by 13.8 percent).

452 *See, e.g.*, Mike Angell, *Telecom Hitting Bottom – Maybe*, Investor's Business Daily, May 7, 2002 (citing announcements by RBOCs that capital spending in 2002 will be cut by 14 to 44 percent); *Reports: Capex May Be Stabilizing*, Telecommunications Reports, June 10, 2002, at W-8 (stating that investment by the top nine U.S. communications service providers declined 35.4 percent from 2001 to 2002).

453 ALTS 2002 Local Competition Report at 5.

454 *Id.* at 6.

as Allegiance, New Edge Networks, Time Warner Telecom, ChoiceOne, PaeTec, Network Telephone, KMC, US LEC, Cbeyond, Broadview, Pac-West, TXU and DSL.net, to name just a few."[455] As WorldCom concedes, "firms that are able to emerge from bankruptcy will be better able to compete, having been relieved of their heavy debt burdens."[456]

Of course, where particular competitors do exit the market, their assets often are grabbed up by other CLECs at bargain-basement prices.[457] WorldCom acknowledges as much, noting that "switches may be re-deployed and fiber added to the networks of the survivors at low cost …."[458] And AT&T just announced that it was "assessing what we call the 'bone pile' of distressed assets coming to market" and had "recently acquired central office facilities in Denver, saving substantial time-to-market and millions of capital dollars."[459] The assets of unsuccessful CLECs do not evaporate; they remain available for use by companies that, through better management or a more rational business plan, are able to survive. Indeed, these assets would lie fallow only if the presence of low-priced UNEs discouraged surviving CLECs from expanding their facilities because the availability of UNEs was simply too good (and too safe) a deal to pass up. For all of these reasons, the Commission should recognize that the downturn provides further support for a policy that limits, rather than expands, unbundling.

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455 *Id*.

456 WorldCom at 23.

457 *See* J. Haring and H. Shooshan, *Reorienting Regulation: Toward a More Facilities-Friendly Local Competition Policy*, Strategic Policy Research, April 3, 2002, at 18, attached as Attachment A to Qwest.

458 WorldCom at 23. WorldCom goes on to state that much of the fiber available from companies that exited the market will be in the same core urban areas where competitive fiber already exists. It provides no evidence, however, that this is generally the case. CLEC fiber may serve many of the same areas, but CLECs often serve different buildings and route their fiber down different streets within those areas.

459 *'Bone Pile' of Distressed Assets Has AT&T Hunting for Bargains*, Telecommunications Reports, Apr. 29, 2002, at 25.

X. CONCLUSION

For the foregoing reasons, and as further explained in Verizon's opening comments, the Commission should modify the unbundling rules as described above in order best to promote both necessary investment and long-lasting competition.

Respectfully submitted,

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